

THE  
LAW AND CUSTOM OF  
THE CONSTITUTION  
ANSON





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OF THE  
CONSTITUTION

BY

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*VOLUME II*

THE CROWN. PART II

FOURTH EDITION

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UNIVERSITY OF EDINBURGH

OXFORD  
AT THE CLARENDON PRESS

1935

OXFORD  
UNIVERSITY PRESS  
AMEN HOUSE, E.C. 4  
London Edinburgh Glasgow  
New York Toronto Melbourne  
Capetown Bombay Calcutta  
Madras Shanghai  
HUMPHREY MILFORD  
PUBLISHER TO THE  
UNIVERSITY

PRINTED IN GREAT BRITAIN

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## CHAPTER VII

### THE DOMINIONS AND DEPENDENCIES OF THE CROWN

THIS chapter must cover a wide field. In official documents<sup>1</sup> the King is described as:

George, by the Grace of God of Great Britain, Ireland, and of the British Dominions beyond the Seas King, Defender of the Faith,<sup>2</sup> Emperor of India.

And yet these words hardly describe the compass of his sovereignty. In this chapter we deal with the relations of the central executive to all those territories which acknowledge the rule of the King, whether or no they fall under the title which we have just set forth.

(1) Thus we must speak of the United Kingdom and its component parts, of the Home Office as the central executive for domestic affairs, and of the Ministry of Health, replacing the Local Government Board, as connecting the forms and areas of local self-government with the central power.

(2) Next we must note the constitutions of the adjacent islands, and the mode in which, mainly through the Home Office, they are connected with the executive government of the country.

(3) Thirdly will fall to be considered the royal prerogative in its relation to the Colonies, the mode of its expression through the Colonial Office, and the limitations imposed upon its exercise by the constitutions of the various Colonies.

(4) Fourthly must be discussed the characteristics of Dominion status and the Constitutions of the Dominions.

(5) Fifthly we must note some miscellaneous possessions of the Crown, the spheres of influence which bring us to the borderland of our foreign relations, and the Protected States

<sup>1</sup> For the royal titles see 39 & 40 Geo. III, c. 67, Art. 1; 39 Vict. c. 10; 1 Ed. VII, c. 15; 17 & 18 Geo. V, c. 4, s. 1; S.R. & O., 1927 (No. 422), p. 325. The title is as arranged by the Imperial Conference, 1926.

<sup>2</sup> Given as a reward for zeal in favour of the Roman Catholic Faith to Henry VIII by the Pope, it was reasserted by Statute after the Reformation (35 Hen. VIII, c. 3).

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and Protectorates which arise from such spheres. Special attention will be devoted to a new type of protectorate, the Mandated Territories, the outcome of the Great War.

(6) Lastly will come the Indian Empire comprising British India and the Indian States.

## I. THE UNITED KINGDOM

### § 1. ENGLAND AND WALES

England and Wales have been one kingdom for so long a time that to consider the process of union between the two seems almost as remote as an inquiry into the welding together of Saxon England under pressure of Danish invasion and Norman rule. But some trace of this gradual assimilation of institutions is still comparatively modern and needs a few words of explanation.

Edward I annexed the territories taken from Llewellyn. He announced this in the Statutum Walliae (1284), which introduced the shire organization into these territories and also into his own domains in Wales. Out of the first he constituted Anglesey, Carnarvonshire, and Merionethshire; out of the second, Flintshire, Cardiganshire, and Carmarthen-shire. With the exception of Anglesey, these shires did not correspond in area with the modern counties of the same name. Flint was cut out of the county palatine of Chester, which, together with the lordships of Carmarthen and Cardigan, had been granted to Edward by his father in his lifetime. Provision was made for the administration of royal justice over these shires, but they were not subject to the Courts at Westminster. The reason was that Wales had never formed part of the realm of England.

Outside of these territories, and on the south, lay the county palatine of Pembroke, and the lordship of Glamorgan, both organized on the shire system, but having those *iura regalia* which constituted them palatinates. On the east, right up to and including some parts of Gloucester, Hereford, and Shropshire, lay the marcher lordships. These lordships, the outcome of conquest from the Welsh by English lords and knights, though nominally held by the King, enjoyed a large measure of independence. They played a considerable part



in the medieval history of England,<sup>1</sup> and from the extent of their jurisdictions were able to subject the dwellers on the land to considerable hardships. This evil was dealt with 200 years later by the establishment of the Court of the 'President and Council of Wales and the Marches' with a jurisdiction corresponding in some measure to that of the Star Chamber. The Council owed its existence to Edward IV who in 1473 set up a Council for his infant son, but it seems to have become permanent only in 1502.

This Court, which exercised a useful and needed severity, and extended its jurisdiction over Salop, Worcester, Hereford, and Gloucester, was confirmed in its jurisdiction by Henry VIII,<sup>2</sup> survived, but for civil jurisdiction only, the Star Chamber and the Commonwealth, and indeed the necessity for its existence, and was abolished by 1 Will. & Mary, c. 27.

But Henry VIII recognized that the evils arising from the lawlessness of the border needed other remedies than these. It was necessary to bring the marcher lordships into the shire system common to the rest of England. By this time Pembroke and Glamorgan had come to be regarded as shires, with the shire organization, and are styled, together with those constituted by the Statutum Walliae, as 'shires of long and ancient time'.

In 1535 the marcher lordships were grouped into five new counties or added to existing counties. Thus were constituted Monmouth, Brecon, Radnor, Montgomery, and Denbigh. Monmouth was treated as a part of England in so far as it was brought under the jurisdiction of the Courts at Westminster, and was thenceforth to be represented by two knights of the shire for the county and one burgess for the borough of Monmouth.

The twelve counties which now constituted Wales were ordained 'to stand and continue for ever from henceforth incorporated, united, and annexed to and with this realm of England'.<sup>3</sup> Each county was to be represented by a single

<sup>1</sup> Tout, *Historical Essays by members of Owens College*, p. 79; C. A. J. Skeel, *The Council in the Marches of Wales*, p. 16. They had almost complete independence of the English Courts, save where a Lord Marcher was a party (Hargrave, *Law Tracts*, 390), or a certificate from a Bishop was requisite.

<sup>2</sup> 26 Hen. VIII, c. 6; 34 & 35 Hen. VIII, c. 26.

<sup>3</sup> 27 Hen. VIII, c. 26, s. 1; cf. 34 & 35 Hen. VIII, c. 26.

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knight of the shire, and one burgess was to represent the shire town of each county except Merioneth. The rules of English law were to prevail, except in the case of such Welsh customs as the King in Council might approve.<sup>1</sup> In 1543 Chester<sup>2</sup> was given two knights for the County and two burgesses for the city.

An Act of 1543<sup>3</sup> made fuller provision for the administration of justice. Four circuits were formed, covering the whole area of the Principality, and four justices were to sit, with the Royal Commission, twice a year in each county, exercising a jurisdiction as large as that of the King's Bench and Common Pleas at Westminster.

The organization of justice was provided for on the lines of an English county; but the Courts above referred to, called the King's Great Sessions, and the Court of the President and Council of Wales and the Marches, were outside and independent of the jurisdiction of the Westminster Courts.<sup>4</sup> But these Courts by Statute and usage acquired a jurisdiction in certain respects concurrent with that of the Great Sessions.

These Courts, however, except that of the President and Council, which was abolished in 1689, transacted the judicial business of Wales, with some modifications of procedure, until 1830,<sup>5</sup> when they were abolished, and the Principality came under the jurisdiction of the Courts of Westminster.

In 1747 it was enacted that the mention of England in an Act of Parliament should be taken to include Wales.<sup>6</sup> It is, however, not rare to find England and Wales used in Acts.

## § 2. SCOTLAND

The relations of Scotland with England are settled by the Act of Union, the provisions of which have been but slightly affected by subsequent legislation. Such a union was inevi-

<sup>1</sup> For an account of the introduction of the shire system into Wales, see Tout, 'The Welsh Shires', *Y Cymmrodor*, ix. 201.

<sup>2</sup> 34 & 35 Hen. VIII, c. 13. In 1569 the authority of the Council over Chester had been repudiated on the score of its position as a County Palatine.

<sup>3</sup> 34 & 35 Hen. VIII, c. 26. Cf. Holdsworth, *H.E.L.* i. 117-32; Tanner, *Tudor Const. Doc.*, pp. 331-4. The Act, despite the introduction of English law, permitted the Crown to legislate for Wales, a power repealed by 21 Jas. I, c. 10, s. 4.

<sup>4</sup> 34 & 35 Hen. VIII, c. 26, modified by 18 Eliz. c. 8, and 13 Geo. III, c. 51.

<sup>5</sup> For an account of these Courts and their abolition, see Rhys and Brynmor Jones, *The Welsh People*, pp. 386-92.

<sup>6</sup> 20 Geo. II, c. 42, s. 3.

table from the time that the two kingdoms were placed in the same allegiance by the accession of James VI of Scotland to the throne, and James would gladly have procured union,<sup>1</sup> had Parliament been willing. Very early in the reign of James it was held that Scotsmen born after James had become King of England were entitled to the rights and privileges of English subjects, being born in allegiance to the English King.<sup>2</sup> The Crown of Scotland followed throughout the seventeenth century the vicissitudes of the English Crown; for a brief period Scotland was represented in the Parliaments of Cromwell. The Scots Parliament in 1661 declared the hereditary right of Charles II, and in 1689 followed the English Bill of Rights with the Scots claim of right, and the offer of the Crown of Scotland to the King and Queen of England.<sup>3</sup> As the inconvenience of separate Parliaments and the risks of a divided succession made it plain that union was inevitable, each Parliament tried to force the hand of the other. The Scots in 1704 passed the Act of Security providing that, unless on the death of Anne there were heirs of her body, or a successor was appointed by her in conjunction with the Estates, then in such case the Estates should appoint a successor. The person so appointed was not to be successor to the throne of England, unless meantime provision was made for the independence of Scotland and its freedom from English influence.<sup>4</sup> Scottish opinion had been exacerbated by the failure of the Darien Co.'s enterprise which was attributed to English hostility to Scots colonial enterprise.

The English Parliament retorted next year by an Act which made Scotsmen aliens and prohibited the importation of Scots cattle, coals, or linen after Christmas Day, 1705. But England could not afford a hostile Scotland, generous bribery was applied; and before this last Act could take effect the terms of union were so far settled by Parliamentary Commissioners for the two countries that the English Parliament repealed the threatening clauses.

<sup>1</sup> Tanner, *Const. Doc. of James I*, pp. 23, 35-7.

<sup>2</sup> *Calvin's Case* (1608), 2 St. Tr. 611.

<sup>3</sup> *Acts of the Parliament of Scotland*, ix. 38.

<sup>4</sup> *Acts of the Parliament of Scotland*, xi. 136. The royal assent had been refused to this Bill in 1703, but the plan of tacking it to the Supply Act forced the Queen to yield.

The United Kingdom of Great Britain was the creation of the Treaty of Union.

From 1603 until 1707 England and Scotland had been two communities in allegiance, to a King who held his Crown by two distinct titles, governed through two distinct executive bodies, and taxed and legislated through two distinct Parliaments.<sup>1</sup> In 1707 the Act of Union was passed.<sup>2</sup> Its main provisions secured that England and Scotland should be one kingdom, and the succession to the Crown the same for both countries, that they should have one Parliament, and that except as otherwise agreed the rights of citizenship should be the same for all.

The representation and taxation of the two countries were settled in proportion to their respective numbers and wealth; the ecclesiastical arrangements of the two countries were carefully maintained as then existing. Scotland, moreover, retained her rules of private law and the constitution and procedure of her Courts. The judgments of the Court of Teinds and the Court of Session<sup>3</sup> from which appeal had lain to the Parliament of Scotland were held, though this was not expressly stated in 6 Anne, c. 11, apparently by a mere usurpation of authority, to be subject to appeal to the House of Lords. A new Court of Exchequer was constituted in Scotland for revenue purposes by 6 Anne, c. 53; from this, too, error lay to the House of Lords.

It remains to consider the relations of Scotland since the Union to the legislative, executive, and judicial machinery of the constitution. The representation of Scotland in the Parliament of the United Kingdom has been dealt with elsewhere.<sup>4</sup> Like the rest of the United Kingdom, Scotland is not merely subject, in common with the whole Empire, to the

<sup>1</sup> For the essential distinction between the status of Scotland and Ireland and the oversea colonies, see *Craw v. Ramsay* (1670), Vaughan's Rep. 278; Keith, *Const. Hist. of First British Empire*, pp. 382 ff.

<sup>2</sup> 6 Anne, c. 11. The Acts of Ratification passed in Scotland on 16 Jan., in England on 6 Mar. 1707.

<sup>3</sup> The Court of Session is the supreme civil Court of Scotland. The Court of Teinds was a body of Commissioners, since absorbed into the Court of Session, for dealing with ecclesiastical endowment by way of tithe, readjusting its distribution in the interests of the Church, making new parishes, or altering the boundaries of existing parishes. See pp. 315, 316 *post*.

<sup>4</sup> Vol. i: *Parliament*, pp. 135-7.

sovereignty of Parliament, but Acts of Parliament are of force in Scotland unless their operation is limited by express words or necessary implication. The attempt made in the Acts of Union with Scotland and Ireland to frame fundamental laws which no subsequent Parliament might alter is noticed elsewhere.<sup>1</sup>

The Executive Government of Scotland was for some years after the Union conducted by a Secretary of State for Scotland.<sup>2</sup> This office was not continuously filled, but existed, with a break from 1725 to 1742, until 1746. On the rearrangement of the business of the Secretariat in 1782, the Home Office<sup>3</sup> took over the formal conduct of Scots affairs, the Home Secretary being advised in these matters by the Lord Advocate, a law officer corresponding to the English Attorney-General but discharging for the purpose of the domestic business of Scotland the duties of an Under Secretary for the Home Department. In 1885 a separate department was created for the conduct of Scots business, and a Secretary for Scotland appointed who was not a Secretary of State nor necessarily a member of the Cabinet. Almost all the business which was before transacted in the Home Office, through the Secretary of State advised by the Lord Advocate, was assigned to the new department,<sup>4</sup> which in 1926 was elevated to the rank of a Secretaryship of State.

In judicial matters Scotland retains her own law, her own Courts with their procedure.<sup>5</sup> The jurisdiction of the House of Lords, in appeal from the Courts of Teinds and of Session, which rested on analogy with the practice before the Union, is now based on the Appellate Jurisdiction Act, 1876.

### § 3. NORTHERN IRELAND

It is necessary to be brief in noticing the relations of

<sup>1</sup> *Ibid.*, p. 8.

<sup>2</sup> Stanhope, *Hist. of England*, ii. 69. For a list of such Secretaries, see Thomson, *Secretaries of State, 1681-1782*, p. 185; for their status, pp. 30-6, 164-6.

<sup>3</sup> Scots affairs were usually in the hands of the Southern Department, though Newcastle dealt with them when at the Northern Department (1748-54).

<sup>4</sup> See vol. ii, part i, p. 184.

<sup>5</sup> For successful opposition on the part of Scotland to the English Courts dealing with cases affecting Scots firms in certain cases of contracts, see Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 233, 250.

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England, or later of Great Britain, to Ireland before the Act of Union in 1801.

Henry II and John endeavoured, so far as their conquest and settlement of Ireland allowed, to impart the English law and judicial organization to their Irish subjects, English law being declared to be in force.<sup>1</sup> Irish Parliaments came into existence early in the fourteenth century, summoned in the same form as English Parliaments by the deputy of the English Crown. In 1495 was passed, by one of these, the celebrated Statute called after the deputy of the time 'Poynings' Law'.<sup>2</sup> In two important points it altered the relations of Ireland to the English Crown. It brought into force in Ireland all English Statutes existing at the date of its enactment. It limited the meetings and the legislative powers of the Irish Parliament. Henceforth the Parliament met only when the King's deputy or lieutenant certified the causes of summons under the Great Seal of Ireland and obtained licence for holding a Parliament; while the legislative powers of Parliaments so summoned were limited to the acceptance or rejection of bills already approved by the Crown in Council.

The relations of the Irish Parliament to the Crown, thus established by Poynings' Act, were, in the reign of Mary,<sup>3</sup> further explained: after the Irish Parliament had been summoned, other proposed enactments might be certified by the Lord Lieutenant and approved by the Crown in Council: the Parliament might then 'pass and agree upon such Acts and no other'. With these limited powers it occasionally showed signs of independence, as by the rejection of a money Bill in 1692, and it acquired a modified power of initiation by the practice of submitting to the Irish Privy Council the heads of Bills which it desired to see passed: these were sent, or not sent, to the King at the option of the Privy Council; and if returned were submitted to the Irish Parliament in the form approved by the Crown in Council, to be accepted or rejected without amendment. Thus the Parliament obtained a power

<sup>1</sup> For the gradual extension of English law, completed only by James I, see *Moore v. Att. Gen.*, [1934] I. R. 34, 87 ff.

<sup>2</sup> 10 Henry VII, c. 4, s. 10; see *Irish Statutes*, Revised ed., Appendix, p. 761; Ball, *Irish Legislative Systems*.

<sup>3</sup> 3 & 4 Ph. & M. c. 4; see *Irish Statutes*, Revised ed., Appendix, p. 776.

of suggesting legislation somewhat similar to that of the mediæval English Parliament, and when, after the Revolution, the hereditary revenues of Ireland no longer met the expenses of government, the Irish Parliament was of necessity more frequently summoned, and its importance proportionately increased.

So far the restraints upon the Irish Parliament had come mainly from the prerogative of the Crown. From the time of the Revolution its legislative independence was threatened by the claims put forward by the English Parliament. In 1720 an Act was passed<sup>1</sup> declaring the powers of the Crown in Parliament to make laws to bind the people and kingdom of Ireland, and the same Act denied the appellate jurisdiction which the Irish House of Lords had exercised, and asserted it for the English House of Lords.

The duration of Irish Parliaments, which had been limited only by the prerogative of dissolution or demise of the Crown, was by the Octennial Act in 1768 fixed at eight years, unless either of the two causes above-mentioned should operate to bring about a speedier dissolution. An increased freedom of action in dealing with money Bills was only one of many signs of impatience, which Swift's genius had promoted, at the legislative subordination of Ireland to England. A perpetual Mutiny Act, passed at the instance of the English ministers, helped to bring to maturity the demand for the independence of the Irish Parliament. The French participation in the war of American independence gave Ireland her chance; her volunteers declared for independence and freedom of commercial relations with the colonial Empire.

In 1782 this independence was obtained. The British Parliament passed Resolutions one of which pronounced in favour of the repeal of the Declaratory Act; while another was to the effect that an address should be presented to the King asking him to take such measures as would place the connexion of the two kingdoms on a basis of mutual consent. In pursuance of these resolutions the Declaratory Act was repealed;<sup>2</sup> the right to legislate for Ireland, as well as the

<sup>1</sup> 6 Geo. I, c. 5; and see Lecky, *Hist. of England in the Eighteenth Century*, ii. 225; Keith, *Const. Hist. of First British Empire*, pp. 7, 8.

<sup>2</sup> 22 Geo. III, c. 53.

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right asserted for the House of Lords as a Court of error and appeal from the Irish Courts, was thereby renounced. The King gave his assent to various Irish Bills repealing the perpetual Mutiny Act, and removing the executive restrictions upon Irish legislation. Henceforth the necessity of obtaining the royal assent from the King in Council was to be the only restraint on the action of the Irish, as on the British Parliament. In the following year, for the more complete assurance of the Irish in their new rights, on which doubt had been cast by events in England, the British Parliament passed an Act of Renunciation,<sup>1</sup> by which the legislative and judicial independence of the Irish Parliament and the Irish Courts was recognized so fully and explicitly as to satisfy every demand which Ireland had made on the subject.

It is important to understand the working of the constitution under this phase of the relations between Great Britain and Ireland. The King of Great Britain was the King of Ireland. He was represented in Ireland by a Lord Lieutenant who, like the representative of the Crown in a self-governing colony, chose the Irish Executive. But, although the Irish Parliament enjoyed a legislative independence nominally larger than that of some of the self-governing Dominions of to-day, Ireland had not their measure of self-government. The royal veto was a reality, though it was rarely used, and the responsibility of ministers to Parliament was not recognized. Great offices in the Irish Government had long been treated as sinecures which formed part of the patronage of the First Lord of the Treasury in England: it was not until 1793 that a Treasury Board responsible to the Irish Parliament was even contemplated;<sup>2</sup> nor was there any recognized impropriety in the tenure of high office by a vehement opponent of an important Government measure.<sup>3</sup>

The fact was that the Irish Executive represented English party politics. In the language of Lecky, 'Ministerial power was mainly in the hands of the Lord Lieutenant and his Chief Secretary, and this latter functionary led the House of Commons, introduced, for the most part, Government business,

<sup>1</sup> 23 Geo. III, c. 28.

<sup>2</sup> Lecky, *Hist. of England in the Eighteenth Century*, vi. 565.

<sup>3</sup> *Ibid.* vi. 599.



and filled in Ireland a position at least as important as that of a Prime Minister in England.<sup>1</sup>

The Irish House of Commons was, really, less representative of the Irish people than was the English House of Commons of the English people before 1832. Not until 1793 were Roman Catholics admitted as electors, but not as members. No great desire was expressed for a responsible executive. When Lord Fitzwilliam carried out the official changes and dismissals, which led to his recall, in 1794, these changes were not made in consequence of votes given or representations made by the Irish House of Commons. They were regarded as indicating a change of policy on the part of the English Government.

The Chief Secretary to the Lord Lieutenant, who sat in the Irish House of Commons and introduced Government business, was, like the Viceroy, representative of the party in power in England. If the Irish Parliament had been really representative, and had insisted upon the responsibility of the executive, the situation might easily have become impossible, because it would be difficult to suppose that the balance of parties and currents of political opinion would have worked in correspondence in the two countries.

The governor of a self-governing Dominion is a neutral person, a constitutional king: the Viceroy and Chief Secretary alike were members, and practically nominees, of the party in power in England. Thus it might have happened that the Viceroy who was charged with the selection of ministers in Ireland, and the Chief Secretary who was charged with the conduct of Government business for Ireland, might be summoned away from their duties by a change in the balance of English parties. Those who took their place would certainly be of different political prepossessions. So also the assent to Irish legislation might depend on the political character of the English Ministry.

Again, the enemies of the King of Great Britain would be the enemies of the King of Ireland,<sup>2</sup> but the foreign policy of the King of the two countries, the declaration of war or the

<sup>1</sup> Ibid. vi. 318.

<sup>2</sup> Some doubt indeed was felt at times as to this point, an argument used by Pitt in favour of his scheme of 1785. The controversy as to the regency in 1788 also illustrated the risk of divergence of policy.

maintenance of peace, would certainly be determined by the advice of his British ministers. The views of his Irish Executive would reach him, if at all, through the Viceroy, himself a member of the British ministry; the views of the British ministers would carry all the weight that would be due to the comparative importance of Great Britain and Ireland; they would be communicated directly, while the opinions of the Irish Executive would pass through an intermediary, perhaps unfriendly to their tenor. So the foreign policy of Ireland would be shaped by the British ministry whether the Irish would or no. But, although a declaration of war by the King of the two countries might bring Ireland into hostilities with a power against whom she had no ill will, the Irish Parliament could effectively cripple the military operations of England by refusing to vote money and men, or by requiring of its executive a policy adverse to that of its neighbour. A collision between the Irish Executive responsible to the Irish Parliament, and the Viceroy and Chief Secretary responsible to the English Parliament, would under such circumstances have been inevitable.

The relations between the two countries could, in truth, only work well by the exercise of great public spirit and mutual forbearance on both sides, or by the existence of indifference or corruption on one. Fortunately for the well-being of the two countries there was no change in the English ministry during seventeen years out of the nineteen that Ireland enjoyed this practical independence of the English Government.

The relation of Ireland to Great Britain at the time of the Act of Union presented some such difficulties as did the relation of England to Scotland at the commencement of the eighteenth century. Ireland and Great Britain were two independent countries under the same King, but the difficulties in the case of Ireland were greater than in that of Scotland, because the supreme executive in Ireland was dependent on the action of party government in England, and because differences of race and religion caused a risk of disturbance in the smaller kingdom which might necessitate the use of force by the larger kingdom.

It is not necessary to pronounce on the merits or demerits

of the scheme of 1782-3, or of the policy and procedure of Pitt in bringing about the Act of Union in 1801, beyond noting that the means adopted unfortunately involved bribery on a large scale and the giving of assurances of Catholic emancipation which were not made good.

The terms of this Union, embodied in Acts of the two Parliaments,<sup>1</sup> provided that the succession to the Crown should be the same, and that there should be one Parliament for the two countries. The amount of Irish representation in the Lords and Commons was determined: the subjects of the two countries were to possess equal rights as to trade, navigation, and treaties with foreign powers. The Irish laws and Irish Courts were unaffected by the change, except that from the Irish Courts an appeal lay henceforth, as before 1782, to the House of Lords of the United Kingdom.

The relations of Ireland to the Parliament of the United Kingdom under the Union as regards representation have been described in vol. i of this work; as regards subordination it may be said that Ireland was bound by a public statute unless expressly or by natural implication excepted.\*

Its relations to the executive were neither so simple nor so satisfactory. The King was represented in Ireland by a Viceroy or Lord Lieutenant; in formal matters the pleasure of the Crown was signified to him through the Secretary of State for the Home Department, while the Chief Secretary was in everything but name and rank a Secretary of State for Ireland. The administration of public business in Ireland was conducted by a number of Boards, of which comparatively few were under the full and direct control of the Irish Government of the day.<sup>2</sup> Nevertheless, the Chief Secretary might be called to explain or justify the action of these Boards, if questioned in Parliament. The Lord Lieutenant had large prerogatives, and his immunity from action in the Courts of the country for any act done in his official capacity was larger than that of a Colonial Governor,<sup>3</sup> but the real power normally rested with the Chief Secretary.

<sup>1</sup> 39 & 40 Geo. III, c. 67, and *Irish Statutes*, Revised ed., 40 Geo. III, c. 38.

<sup>2</sup> For a description of these Boards, see the speech of A. Birrell on 7 May 1907, in introducing the Irish Council Bill; *Parl. Deb.*, 4th Ser. clxxiv, 83.

<sup>3</sup> The legal immunities of the Lord Lieutenant will be noted later. It

The Irish Courts were constituted on the model of the English Courts, and administered the English municipal law.

The unrest in Ireland, due to discontent at the Union and to resentment of the failure to grant Roman Catholic emancipation which had been expected as the fruit of union, resulted in the evolution of a movement for the recovery of independence. This movement was adopted in the form of a proposal for Home Rule by Gladstone in 1886,<sup>1</sup> but his Bill was rejected in the House of Commons, and the Liberal party was permanently weakened by the secession of the Liberal Unionists. It was, therefore, not until 1893 that a measure to grant Home Rule was passed by the Commons in Gladstone's last ministry, only to be rejected decisively by the Lords. The problem, however, remained as far from solution as ever, and the generous measures of the Unionist administration to settle the land question by buying out the land owners, at considerable cost to the United Kingdom as a whole, did nothing to extinguish the demand for self-government, while it weakened the forces contending for union. In the Parliament of 1906 the Government was unable to propose a measure owing to pre-election pledges, and a minor suggestion of devolution was unacceptable to the Irish Nationalists. In 1910, however, after the elections fought on the issue of finance and the position of the House of Lords, the Government had a free hand, and in 1914 under the procedure of the Parliament Act, 1911, it passed a Government of Ireland Act, but under pressure of war conditions agreed that by another measure the operation of this Act should be postponed with a view to the elimination of Ulster from its operation in some form or other.<sup>2</sup> With the war disappeared the last hope of preserving Ireland as an integral part of the United Kingdom, for the Nationalist party, which hitherto had prevailed, lost ground on all hands to the revolutionary Sinn Fein movement. An effort to satisfy the demand for self-government was made by the Government of Ireland Act, 1920, which

is enough here to refer to the case of *Sullivan v. Spencer* (Irish Reports, 6 C.L. 176), and to invite comparison between that case and *Musgrave v. Pulido* (1879), 5 App. Cas. 102.

<sup>1</sup> See Morley, *Life of Gladstone*, iii. 290 ff., and also Gardiner, *Sir W. Harcourt*, i. 556 ff., ii. 1 ff.

<sup>2</sup> Oxford, *Fifty Years of Parliament*, ii. 135-58.

divided Ireland into Northern and Southern Ireland, and conferred on both Parliaments with considerable powers. But the measure was quite unsatisfactory to the revolutionary party, who maintained the struggle and set up a rival government, the members elected to the Southern House of Commons under the Act of 1920 serving in many cases as supporters of the revolutionary régime. In 1921 peace with Southern Ireland was attained by agreement of 6 December 1921, and the Constitution of the Irish Free State was made operative a year later, the former revolutionary party having in the interim been entrusted with control of the administration.

The Act of 1920, therefore, has validity only for Northern Ireland, but it has necessarily been modified in detail as a result of the grant to the south of Dominion Status as the Irish Free State. The legislative powers of the Parliament have been described above.<sup>1</sup> They have since been augmented in minor details,<sup>2</sup> and more substantially by the grant to the Parliament of the authority which under the Act of 1920 was to have been exercised by the Council of Ireland, which never became effective.

The executive government is vested in a Governor of Northern Ireland, the Lord Lieutenantship having been abolished. He has a delegation of the prerogative of mercy and exercises in general the prerogative and statutory powers of the Crown so far as they relate to the sphere of action allocated to the Northern Government.<sup>3</sup> He is assisted by a responsible ministry, composed of the Prime Minister, and Ministers for Finance, Home Affairs, Labour, Education, Agriculture, and Commerce, who are members of the Privy Council for Northern Ireland.<sup>4</sup>

The finances are managed under an Exchequer and Audit Act, 1921, which is based on the main principles of the Exchequer and Audit Departments Act, 1866. A Comptroller and Auditor-General exercises similar functions regarding issue and audit of funds to those of his namesake in the United

<sup>1</sup> Vol. i: *Parliament*, pp. 410–18.

<sup>2</sup> 15 & 16 Geo. V, c. 77; 18 & 19 Geo. V, c. 24; 22 Geo. V, c. 11.

<sup>3</sup> Letters Patent and Royal Instructions, 9 Dec. 1922.

<sup>4</sup> 13 Geo. V, sess. 2, c. 2, s. 2.

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Kingdom, and a Public Accounts Committee of the Commons functions on the lines of that at Westminster. But the essential sources of seven-tenths of the revenue (customs, excise, income tax, and surtax) are reserved to the British Parliament and are under British control.<sup>1</sup> But the principle has been adopted that Northern Ireland should be allowed due resources for the maintenance of her public services before any claim is made in respect of Imperial expenditure, and as a result the proceeds of imperial taxes collected in Ireland, after deducting the cost of the reserved services, are largely placed at the disposal of Northern Ireland for appropriation to local ends. Strictly speaking, the liability of Northern Ireland should have been determined accurately by a Joint Exchequer Board provided for by the Act of 1920, but this obligation has been very generously interpreted.<sup>2</sup>

The judiciary consists of a Supreme Court.<sup>3</sup> It comprises a High Court under the Lord Chief Justice and two puisne judges, and the Court of Appeal consisting of the Lord Chief Justice and two Lords Justices of Appeal. From the latter appeals lie<sup>4</sup> in various matters, including all issues as to the validity of any Act, to the House of Lords. The Governor may also refer constitutional issues to the Privy Council for decision, and such decisions are binding on all Courts.<sup>5</sup> To the Privy Council also lie appeals on certain matters from the Joint Exchequer Board.<sup>6</sup> There is also a Court of Criminal Appeal, on the English model, whence appeal lies to the House of Lords only on the certificate of the Attorney-General. The Court is created by Imperial Act, the Supreme Court being a reserved subject.<sup>7</sup>

The constitution has been developed strictly on British lines. Thus the original provision for proportional representa-

<sup>1</sup> 10 & 11 Geo. V, c. 67, s. 21.

<sup>2</sup> Ibid. ss. 22-4; but see the report of the Colwyn Committee, 1923, based on the creation of the Free State, and 13 Geo. V, sess. 2, c. 2, s. 1, Sched. 1, para 4 (1); Quekett, *Government of Northern Ireland*, i. 48-50.

<sup>3</sup> 10 & 11 Geo. V, c. 67, Sched. VII.

<sup>4</sup> 10 & 11 Geo. V, c. 67, ss. 49, 50, 53.

<sup>5</sup> Ibid. ss. 51, 53. The power has not so far been used.

<sup>6</sup> Ibid. s. 52.

<sup>7</sup> 20 & 21 Geo. V, c. 45. Since 1922 there is an Incorporated Law Society to control solicitors, and since 1926 an Inn of Court, the Lord Chief Justice admitting barristers.

tion was swept away in 1929,<sup>1</sup> and in lieu 48 single-member constituencies established for the House of Commons, and in 1928 the franchise was extended to women on the same lines as in the United Kingdom.<sup>2</sup> But a qualification of three—or since the Representation of the People Act, 1934, seven—years' residence in the United Kingdom is required, a provision due to the restriction of the franchise in the Free State to citizens, and peers are naturally permitted the franchise.

#### § 4. THE HOME OFFICE

The Secretary of State for Home Affairs is essentially the minister charged with the communication of the royal pleasure in matters concerning internal government and the maintenance of peace and order. Many of his former functions have been handed over to other hands, but matters of government not specifically assigned remain under his control. It is he, therefore, who in case of need asserts the extent of the dominions of the King, when the delicate issue arises whether or not the Crown at the present day maintains the claims put forward by James I regarding the extent of the royal jurisdiction in such places as the Bristol Channel.<sup>3</sup>

The duties of his department from 1782, when the Secretaryship for the Colonies disappeared, were very onerous, for he had to carry out the business formerly transacted by the two Secretaries of State, excluding that concerned with foreign affairs.<sup>4</sup> This included the superintendence of such colonies as survived the loss of the Colonial Empire in North America; the first steps towards the colonization of Australia—whose importance Pitt did not realize; communications between the Home Government and the Irish—and these between 1782 and the Union were frequent and important; and communications with the War Departments relating to the movements of troops at home and abroad.

In 1794 the Home Office was relieved, on the appointment of a new Secretaryship of State, of much business connected with the War Departments, and of colonial business in 1801; the Act of Union with Ireland brought the Chief Secretary to the Lord Lieutenant into closer communication with the

<sup>1</sup> 9 Geo. V, c. 5.

<sup>2</sup> 18 & 19 Geo. V, c. 24.

<sup>3</sup> See *The Fagernes*, [1927] P. (C.A.) 311.

<sup>4</sup> See part i, pp. 179, 180.

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Cabinet, and through his office in London was transacted all Irish business except some matters of a formal character which still passed through the Home Office. Under the new conditions in Ireland the Home Office controls relations with Northern Ireland through the Governor.

It would seem as though a department which had been relieved of so much work must now be lightly burdened ; such was the impression of the Whig economists when the close of the Napoleonic wars reduced the work of the War Department, when the Act of Union had lightened the labours of the Home Office, and when our Colonies were still few and small.<sup>1</sup>

But, though the Home Office may not have been an exacting department in 1816, the State has been very active in the last 120 years, and much of this activity has been exercised at the expense of the Home Office. The statutes which throw duties on the Home Secretary in respect of the good order, security, and general well-being of the community would, if set forth, appal the reader as much as Glanville was appalled by *confusa multitudo* of the customary rules of law in the twelfth century.

The Interpretation Act, 1889, enacts that in every Statute the expression 'Secretary of State' shall mean one of 'His Majesty's Principal Secretaries of State for the time being' ; and we are thereby reminded that there is no duty of any one Secretary of State which, unless Parliament enacts otherwise, may not be discharged by any other Secretary of State. Nevertheless, the functions of the departments are practically quite distinct, nor would any one suppose that the Home Secretary was the Secretary of State referred to in a Military Lands Act, or that the Secretary of State for India was the officer on whom powers were conferred by a Factory Act.

But, in addition to the statutory duties imposed on him, the Home Secretary has customary duties as being in an especial manner His Majesty's principal Secretary of State, and these duties have a certain historical interest.

The business of the Home Office<sup>2</sup> is, for the purposes of the

<sup>1</sup> *Parl. Deb.* 1st Ser. xxxiii. 893, debate on G. Tierney's motion respecting the offices of secretaries of state, 3 Apr. 1816.

<sup>2</sup> There are, besides the permanent Under Secretary of State, a deputy permanent under secretary, and four assistant under secretaries.



department, arranged in seven divisions, each superintended by an assistant secretary; these divisions are respectively concerned with (1) industrial matters; (2) aliens restriction, naturalization, &c.; (3) criminal matters; (4) children; (5) miscellaneous matters, including elections; (6) police; and (7) Northern Ireland, the Channel Islands, and the Isle of Man. But the convenience of the reader may be better suited by a different arrangement. So we will divide the duties of the Secretary of State as follows:

(a) Communications passing between Crown and subject; or, one may say, the expression of the King's pleasure.

(b) Enforcement of public order; or, one may say, the maintenance of the King's peace.

(c) Enforcement of rules made for the internal well-being of the community.

#### *(a) Communications between Crown and Subject*

Whenever the King's pleasure has to be taken, or communicated to an individual or a department, unless the matter is specially appropriate to Foreign, Dominion, Colonial, Military, Air, Naval, or Indian affairs, the Home Secretary is the proper medium of communication. Although each of the Secretaries is capable in law of discharging any one of the functions of the other, yet the Home Secretary is the first in precedence, and his duties bring him into a more immediate and personal relation to the Crown than do those of his colleagues. He is the successor and representative of the King's Secretary as that officer appears to us in the sixteenth century, the minister through whom the King was addressed, who kept the signet and the seal used for the King's private letters, and authenticated the sign manual by his signature. Therefore the Home Secretary has, besides the general duties of his department, much to do that is formal and ceremonial in its character. He notifies to certain great local officials<sup>1</sup> certain matters of State intelligence, such as declarations of

<sup>1</sup> The Lord Mayor of London, the Governor of Northern Ireland, the Lieutenant-Governors of Guernsey, Jersey, and the Isle of Man, and formerly the Lord President of the Court of Session, the Lord Justice Clerk, and the Lord Advocate for Scotland; in their case, any notifications are now made by the Secretary of State for Scotland.

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war, treaties of peace, births and deaths in the royal family. When the King takes part in a ceremonial (other than one arranged by a Dominion Government) he ascertains the royal pleasure as to arrangements, is responsible for their conduct, and must be present.

He receives addresses and petitions which are addressed to the King in person, as distinct from the King in Council, he arranges for their reception, their answer, or their reference by the King's command to the department to which they relate; but whether it be a private individual that addresses the Sovereign, or a great corporation such as the City of London, or the University of Oxford, the matter passes through the hands of the Home Secretary. Besides these miscellaneous duties, in the great majority of cases in which the King's pleasure has to be expressed formally under the sign manual, as in the case of appointments, licences, and dispensations, the grant of honours or pardons, it is the duty of the Home Secretary to cause the document to be prepared for the royal signature, and afterwards to countersign it. Such documents are sometimes complete, for the purpose which they have to serve, when the royal signature has been affixed and countersigned; in other cases they only authorize the preparation of documents which must pass under the Great Seal.

Where a sign manual warrant is an authority for affixing the Great Seal, it must be countersigned either by the Chancellor, one of the Secretaries of State, or two Lords Commissioners of the Treasury, and this duty of countersignature falls most often upon the Home Secretary.<sup>1</sup> Thus in the creation of a Peer the Prime Minister informs the Home Secretary of the intention of the Crown; a warrant for the sign manual is prepared and submitted by the Home Secretary to the King, and having been countersigned by him is returned to the Crown Office as authority for the preparation of the letters patent by which the peerage is conferred, and the affixing to them of the Great Seal. These are then sent through the Home Office to the newly created Peer.<sup>2</sup> The

<sup>1</sup> In many cases, this countersignature indicates formal, not real, responsibility, the latter resting with some other minister.

<sup>2</sup> The form in which the Secretary of State addresses the Sovereign in communicating these matters runs thus:

Mr. Secretary — presents his humble duty to your Majesty, and in

roll of the baronetage provided for by Royal Warrant of 8 Feb. 1910 is kept in his office.

For historical reasons the Home Secretary, among his miscellaneous duties, is the normal means of communication between the King and the Church,<sup>1</sup> for setting in motion the Houses of Convocation, and confining their legislative action within certain limits; in matters of administration he advises the King, and communicates his pleasure to the Lieutenant-Governors of the Channel Islands and the Isle of Man, and to the Governor of Northern Ireland.

In the peculiar form of action by which the subject may sue the Crown, or, what is the same thing, a department of government, the right to sue is technically dependent on the King's grace. The cause of action is stated in a petition which is lodged with the Home Secretary, who takes the opinion of the Attorney-General, and consults any department of State that may be affected by the claim. If the opinion of the Attorney-General is favourable, the petition is submitted for royal endorsement of the fiat 'let right be done'; the petition is then sent to the department concerned, that a plea or answer may be returned in twenty-eight days, and the subsequent proceedings follow the course of an ordinary civil action. No action lies against the Home Secretary for refusing a fiat.<sup>2</sup>

*(b) The maintenance of the King's peace*

The Home Secretary is responsible for peace and good order throughout the land and this responsibility is discharged in various ways:

(1) He exercises a control over the elements of possible disorder.

(2) He supervises, more or less closely, the police force of counties and towns.

(3) He has to do with the machinery for the administration of criminal justice.

transmitting the accompanying documents for your Majesty's signature humbly begs leave to explain, &c.

<sup>1</sup> If the Home Secretary should not be a member of the Church of England these duties may be discharged by the First Lord of the Treasury. See speech of Mr. Secretary Matthews, *Parl. Deb.*, 3rd Ser. cccxlix. 1734, 1746.

<sup>2</sup> *Irwin v. Gray* (1863), 3 F. & F. 636 n. See chap. XII, sect. vi, § 2, below.

(4) He controls prisons and other places for the detention of convicted persons, or of unconvicted persons charged with crime.

(5) If justice demands that a sentence should be annulled or commuted he advises the King in the exercise of the prerogative of mercy.

(1) The naturalization of aliens may seem but remotely connected with the duties of the Home Secretary in the maintenance of the peace, but war conditions in 1914-18 revealed the dangers inherent in the naturalization of aliens who retained their own nationality and owed loyalty to a foreign state. The British Nationality and Status of Aliens Act<sup>1</sup> gives to him an absolute discretion, and he may, 'with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good'. He is therefore entrusted with the power of determining whether or no a candidate for citizenship is likely to prove a good citizen. Since 1918 he has been given the power on certain conditions of determining naturalization of persons who have proved unworthy.<sup>2</sup>

He is further charged with ensuring the observance of the Foreign Enlistment Act,<sup>3</sup> and of the Act<sup>4</sup> which confers privileges upon foreign ambassadors and their servants: he preserves, in these respects, the amicable relations of the subjects of the King with those of foreign powers.

The Home Secretary, with the other Secretaries of State and the First Lord of the Admiralty, is entitled to employ a portion of the sum—now variable (£180,000 in 1934-5)—available for secret service within the kingdom. The right and the duty, if occasion requires, of detaining and opening letters in the Post Office rests in Great Britain upon the Home Secretary, in Northern Ireland upon the Governor. This power, which extends to telegraphic communications, is occasionally, though not frequently, used.<sup>5</sup> He may for

<sup>1</sup> 4 & 5 Geo. V, c. 17, s. 2.

<sup>2</sup> *Ibid.* s. 7.

<sup>3</sup> 33 & 34 Vict. c. 90.

<sup>4</sup> 7 Anne, c. 12, s. 6. Cf. *Engelke v. Musmann*, [1928] A.C. 433.

<sup>5</sup> 7 Will. IV and 1 Vict. c. 36, extended to telegrams by 32 & 33 Vict. c. 73, s. 23. For instances of the use of this power see Parker, *Life and Letters of Sir James Graham*, vol. i, ch. xiv, and the Report of a Committee of the House of Commons which sat to inquire into precedents for the action of

State purposes control the use of the telegraph;<sup>1</sup> he may obtain, without showing cause, the issue of a writ *ne exeat regno* to keep a subject within the realm;<sup>2</sup> in cases of anticipated disorder even if a tumult, riot or felony has not taken place or is not immediately apprehended, he may approve or enforce provisions for the appointment of special constables,<sup>3</sup> and can call in the aid of the Admiralty and War Office when necessary for the maintenance of the peace. His sanction is requisite for the movement of troops, when requisitioned to assist the civil power in the suppression of riots.<sup>4</sup> The wide powers conferred on the Crown by the Emergency Powers Act, 1920, fall in large measure to be exercised on his initiative.<sup>5</sup>

Again, though the Secretary of State is not, as such, a magistrate *ex officio*, nor has a general power of commitment, it seems settled that he may commit persons charged with treason or offences against the State, in virtue of an authority transferred or delegated by the Crown.<sup>6</sup> Akin to this direct interposition of the Home Secretary for the maintenance of order may be reckoned his duties in respect of the extradition of persons who have committed crimes in foreign countries and have taken refuge upon our shores.

Sir James Graham in 1844. In this Report (vol. xiv of Parliamentary Papers for 1844) the whole history of the subject is set forth, and it is interesting to note that, in contrast to the indignation excited by the exercise of this power in 1844, the Commonwealth Parliament in 1657 considered that one advantage derived from the existence of a Post Office was the opportunity for discovering dangerous designs against the welfare of the Commonwealth when communicated by letter.

The power was exercised by Sir William Harcourt in 1882. See *Parl. Deb.*, 3rd Ser. cclxvii. 294. It was widely applied in the war of 1914-18. More recently it has been resorted to in aid of the suppression of the practice of sending communications between the United Kingdom and the Irish Free State relative to lotteries which are normally illegal; cf. *Betting and Lotteries Act*, 1934, s. 21. <sup>1</sup> 26 & 27 Vict. c. 112.

<sup>2</sup> It is now used only in cases within s. 6 of the Debtors' Act, 1869; *Drover v. Beyer* (1879), 13 Ch. D. 242.

<sup>3</sup> 1 & 2 Will. IV, c. 41, s. 2; 4 & 5 Geo. V, c. 61; 13 & 14 Geo. V, c. 11; S.R. & O, 1933, No. 905.

<sup>4</sup> Troup, *The Home Office*, p. 50 f.

<sup>5</sup> See part i, p. 314.

<sup>6</sup> The cases bearing on this point are *Entick v. Carrington* (1765), 19 St. Tr. 1030; *R. v. Despard* (1798), 7 T.R. 736; *Harrison v. Bush* (1855), 5 E. & B. 353. The authorities are not clear or conclusive; but since all Privy Councillors are placed in the Commission of the Peace for every county we need not trouble ourselves to reconcile the *dicta* and decisions of Lords Camden, Kenyon, and Campbell.

The Extradition Acts of 1870, 1873, 1895 and 1932<sup>1</sup> lay down rules for the surrender of fugitive criminals,<sup>2</sup> which the King may make applicable by Order in Council to any foreign state with which an arrangement to that effect has been made. The process may be described as follows: the diplomatic representative of the country within whose jurisdiction the crime has been committed makes application to the Secretary of State, who thereupon decides whether the crime is of a political character.<sup>3</sup> Should this be the case he is bound to make no order in the matter. If, however, the crime is non-political and is one of those included in the treaty arrangement between the countries, the Secretary of State sends an order to a police magistrate or justice of the peace for the issue of a warrant for the apprehension of the alleged criminal. Either of these last-mentioned officials may issue such a warrant, but must give notice thereof to the Secretary of State, who can, if he think fit, cancel the warrant and discharge the person apprehended. At the end of fifteen days, at the least, during which period the accused may by *habeas corpus* proceedings question the validity of his detention, the Secretary of State may make an order under his hand and seal for the surrender of the criminal to a person duly authorized by the foreign State.

But the alleged criminal must not be surrendered for a political offence, nor be tried for any other crime than that for which he is surrendered; nor—if he is charged with any offence committed within the jurisdiction of the English Courts—may he be surrendered until he has been tried and acquitted or has undergone sentence.

Analogous responsibilities and powers, free from some of the restrictions just mentioned, are possessed by the Secretary of State under the Fugitive Offenders Act,<sup>4</sup> 1881, in respect of persons accused of offences in one part of the King's dominions and found in another part. He is further required to consent to proceedings against a foreigner under the Territorial Waters Jurisdiction Act,<sup>5</sup> and to explain, if called upon

<sup>1</sup> 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33.

<sup>2</sup> A criminal may be extradited for an offence committed in England by correspondence to a person in a foreign country.

<sup>3</sup> See *Castioni, In re*, [1891] 1 Q.B. 149; *Meunier, In re*, [1894] 2 Q.B. 415.

<sup>4</sup> 44 & 45 Vict. c. 69.

<sup>5</sup> 41 & 42 Vict. c. 73.

to do so by any Court within the British dominions, the nature of a jurisdiction claimed under the Foreign Jurisdiction Act.<sup>1</sup> Such and so miscellaneous are the duties of the Home Secretary in guarding against the possibilities of disorder.

(2) For ordinary purposes we look to the police to keep order. A police force is a local force, and is, in England, with one exception, under the general control of a local authority. The exception is the Metropolitan Police Force in the administrative County of London. But in all cases the Home Secretary exercises supervision or control over the exercise of their powers by county and borough councils.

In counties his sanction is necessary to the appointment of a Chief Constable. He must approve the numbers and pay of the force or any change therein; he must also sanction the rules made for its government and duties, for the distribution of the pension fund, and for the fees payable to police constables for the discharge of certain duties. He appoints inspectors on whose report as to the efficiency of the force depends the subvention which is paid towards its maintenance from the Exchequer.<sup>2</sup>

In boroughs, which have their own police, the Home Secretary receives reports from these inspectors in order that he may be satisfied as to the payment of this subvention. In the City of London the Commissioner of the City Police is appointed by the Mayor and Aldermen subject to his approval, and he sanctions the regulations made for the force.

But the Metropolitan Police have been under the immediate control of the Secretary of State ever since they were established in 1829 in substitution for the old local system of watchmen. The Metropolis for this purpose is a district constituted out of portions of the counties of Middlesex, Essex, Kent, and Surrey, from which is excepted the area comprised by the City. This district, which by 2 & 3 Vict. c. 47 included any part of a parish or place which was not more than fifteen miles distant from Charing Cross in a straight line, was extended by Order in Council of 3 January 1840 over certain

<sup>1</sup> 53 & 54 Vict. c. 37, s. 4. This is usually done by the Secretary of State for the Colonies for protectorates of all kinds.

<sup>2</sup> 51 & 52 Vict. c. 41, ss. 25, 27.



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parishes specified in the Order.<sup>1</sup> Within this district the Home Secretary is the police authority. He advises the Crown as to the appointment of the Commissioner, Assistant-Commissioners, and Finance-Officer of the police: the rules for the government of the force, the pay and superannuation allowances of its members, the sites and construction of its buildings, are all determined by him or subject to his approval. In 1933 he decided on the institution of a system of short-term recruitment (10 years) for the rank and file, and of training of selected candidates for the higher ranks, in a Training College, to take the place of the former rule of entry through the rank of constable only.<sup>2</sup>

The Commissioner has the practical and immediate control of the force, but in various details as to licensing of refreshment houses and cabs, his action must be sanctioned by the Home Secretary, who is responsible to Parliament for the efficiency and good conduct of the force. His powers as to licensing for tramcars, light railway cars, and trolley vehicles, their drivers and conductors, are now subject to control by the Minister of Transport.<sup>3</sup> Control over traffic is shared with the Traffic Commissioner for the Metropolitan Area.<sup>4</sup>

(3) As regards the machinery for the administration of justice, he may be consulted as to the frequency with which assizes should be held, and how, on the occasions when assizes are not held in each county, the most convenient arrangements may be made for the trial of prisoners.

Where a borough has not only a separate Commission of the Peace, but also a separate Court of Quarter Sessions—both matters conceded on his advice—a judge of such a Court is appointed by the Crown on the advice of the Home Secretary. This judge is styled the Recorder; an increase to the Recorder's salary, the number of sittings of the Court (beyond four times a year), the appointment of a deputy, are all matters within his discretion.<sup>5</sup>

He exercises powers of a very similar character as to the

<sup>1</sup> *Statutory Rules and Orders Revised*, 1904, iv. 1201.

<sup>2</sup> Parl. Pap. Cmd. 4320; 23 & 24 Geo. V, c. 33.

<sup>3</sup> London Passenger Transport Act, 1933, s. 51 (3), (4). Similarly as regards public service vehicles. See also Road Traffic Act, 1934, s. 39.

<sup>4</sup> London Passenger Transport Act, 1933, s. 51.

<sup>5</sup> 45 & 46 Vict. c. 50, Part viii.



assistant judge of the London Sessions and the stipendiary magistrate of a borough; the appointments of the police magistrates in the Metropolis and the regulation of the business of their Courts are entirely in his hands: he also settles the fees to be taken by Clerks of the Peace<sup>1</sup> and confirms the appointment of, and can hear appeals as to salaries and remuneration of, Clerks to the Justices,<sup>2</sup> and fixes the salary to be paid to the Clerks of the Peace, not in counties,<sup>3</sup> in lieu of fees: he also fixes the table of fees to be paid to prosecutors and witnesses.

(4) The duties of the Home Office in respect of Prisons are connected with a long history of prison management and discipline which cannot be dealt with here. The institutions to be considered are of four kinds:

(a) The prisons which are used for the detention of unconvicted as well as for the punishment of convicted persons.

As regards these prisons, the process by which the powers of the Home Secretary have grown at the expense of local authorities may be described as, first, inspection; next, regulation; lastly, complete responsibility and control. The three stages are illustrated by the Acts of 1835, 1865, and 1877.

By the last of these, 39 & 40 Vict. c. 21, s. 5, the prisons, their furniture and effects, the appointment and control of all officers, the control and custody of the prisoners, all powers and jurisdiction vested in prison authorities or justices in session, at common law, by Statute or by charter, are transferred to and vested in the Secretary of State.

These matters are the subject of rules made by the Secretary of State, and he is further required to make rules as to the execution of a capital sentence within prison-walls, and to receive a certificate from the sheriff charged with the execution, in each case, that these rules are observed.<sup>4</sup>

(b) Convict prisons to which persons sentenced to long terms of imprisonment are consigned.

<sup>1</sup> 11 & 12 Vict. c. 43, s. 30.

<sup>2</sup> 4 & 5 Geo. V, c. 58, s. 34 (1), (2), (4). This does not apply to clerks at Metropolitan police courts, or in the City of London.

<sup>3</sup> These salaries are decided by Quarter Sessions subject to appeal to the Home Secretary; 21 & 22 Geo. V, c. 45, ss. 3, 16, 17.

<sup>4</sup> 31 & 32 Vict. c. 24.

In respect of these prisons the Secretary of State always enjoyed a special control over their officers, and over the mode of confinement of persons under sentence of penal servitude, the form of punishment substituted in 1857 for transportation.<sup>1</sup>

Licences to be at large on condition of good behaviour are granted by the Crown through the Home Secretary,<sup>2</sup> and the revocation of such a licence is signified by him to a police magistrate of the Metropolis, who is thereupon required to issue a warrant for the apprehension of the convict, which may be executed anywhere in the United Kingdom and Channel Islands.

(c) Asylums for the reception of criminal lunatics.

The Home Secretary has large powers over persons who are either found to be insane on arraignment, or tried and found by the jury to be guilty of the act charged but insane at the time, or who go mad in prison; he may direct the place of confinement, he has a discretion as to the time of discharge, and he appoints a council for the supervision of the State Asylums for criminal lunatics at Broadmoor and Parkhurst.<sup>3</sup>

(d) Reformatories and industrial schools—now styled approved schools—for the correction of juvenile offenders.

Reformatories<sup>4</sup> were instituted for offenders under sixteen years of age convicted of an offence punishable with penal servitude or imprisonment, and sentenced to detention in a reformatory, with or without a previous term of imprisonment.<sup>5</sup>

Industrial schools<sup>6</sup> were for children over five years of age neglected by their parents, or not under proper control, vagrant, or associating with criminals.

Both types of institution have been improved under the Children and Young Persons Act, 1933, consolidating legislation of 1908 and 1932, and are now subject to the Approved Schools Rules, 1933.

The Home Secretary in respect of these institutions

<sup>1</sup> 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

<sup>2</sup> 27 & 28 Vict. c. 47, s. 3, and 54 & 55 Vict. c. 69.

<sup>3</sup> 23 & 24 Vict. c. 75; 47 & 48 Vict. c. 64; S.R. & O. 1906, No. 805; 1913, No. 65.

<sup>4</sup> 29 & 30 Vict. c. 117; 35 & 36 Vict. c. 21, Part i.

<sup>5</sup> 56 & 57 Vict. c. 43.

<sup>6</sup> 20 & 30 Vict. c. 118; 35 & 36 Vict. c. 21, Part ii.

appoints inspectors, certifies as to fitness, approves of rules and changes in building, has power of discharging or removing their inmates, and in other minor matters controls their action. Under his supervision an elaborate system of probation of offenders has been evolved, over which he has extensive power of control.

(5) There remains in this department of his functions the duty of advising the Crown in its exercise of the prerogative of mercy. This prerogative is nothing more than an exercise of a discretion on the part of the Crown to dispense with or to modify punishments which common law or Statute would require to be undergone. It is a dispensing power exercisable under strict limitations, and these limitations may be described as threefold.<sup>1</sup>

Firstly, the prerogative must be exercised in the case of offences of a public character. It is not limited to cases in which the Crown is the prosecutor, for it extends to persons found guilty and sentenced by the House of Lords after impeachment by the House of Commons, but it must be so used as not to affect private rights. It cannot prevent the bringing of an action, or hinder a suit for a penalty recoverable by the individual suing, after such a suit is begun;<sup>2</sup> nor can a recognizance to keep the peace towards an individual be discharged by pardon.

Secondly, it must not be anticipatory. The Middle Ages furnish us with instances of charters of pardon for offences not yet committed, which were in fact licences to commit crime; and the Act of Settlement points to the same danger where it enacts that a pardon may not be pleaded in bar of an impeachment. The meaning of this provision is that a minister who executes a royal command, with an indemnity from the Crown against any legal risk which may follow upon obedience, may not set up such pardon or indemnity as a defence to an impeachment by the House of Commons. As a general rule, however, a pardon can be granted before conviction.<sup>3</sup>

<sup>1</sup> See Chitty, *Prerogative of the Crown*, pp. 88-102.

<sup>2</sup> In certain cases statutory power exists for remission of penalties; 22 Vict. c. 32; 38 & 39 Vict. c. 80; *Todd v. Robinson* (1884), 12 Q.B. D. 530; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 374.

<sup>3</sup> *R. v. Boyes* (1861), 1 B. & S. 311.

Thirdly, a pardon extends only to the offence which has formed the subject of the criminal proceedings. The defendant's character and credit are cleared and renewed, and thus a disqualification may be removed by pardon which could not be removed by serving the sentence.<sup>1</sup> But a pardon does not affect private rights which may have accrued to the party aggrieved; nor where an office has been acquired by corruption, contrary to the provisions of a Statute, can a pardon do more than relieve from the penalty; it cannot restore the office.<sup>2</sup> On the other hand a person pardoned can maintain an action against any one defaming him on the score of the offence.<sup>3</sup>

Thus the prerogative is a discretionary power to remit or modify punishment for a public offence actually committed, a power which must not be exercised so as to infringe private rights or secure the offender in the proceeds of his wrongdoing.

The form of its exercise is by reprieve, commutation, or pardon. In every case a royal warrant is necessary for the remission of the sentence, but the grant of a pardon is attended with greater formality. A pardon was formerly incomplete unless it were under the Great Seal, but since 1827 a sign manual warrant countersigned by the Secretary of State is enough,<sup>4</sup> and takes effect at once if it be a free pardon, or, if it be conditional, on the performance of the condition.

The Criminal Appeal Act, 1907,<sup>5</sup> has not affected the prerogative of mercy or the duties of the Home Secretary. It has, however, given to him the power, in any case in which the exercise of the prerogative has been sought, of referring the case to the Court constituted under the Act, or to obtain

<sup>1</sup> *Hay v. Justices of London* (1890), 24 Q.B.D. 561. Conviction for felony is a disqualification for selling spirits by retail (33 & 34 Vict. c. 29, s. 14); but a free pardon was held to remove the disqualification.

<sup>2</sup> The acquisition of a benefice by simony, or of an office by a bargain contrary to 5 & 6 Eliz. 6, c. 16, are illustrations of this proposition; *Chitty, Prerogative of the Crown*, p. 92.

<sup>3</sup> *Cuddington v. Wilkins* (1615), Hob. 67, 81; cf. *Leyman v. Latimer* (1878), 3 Ex. D. 352. Occasionally compensation from public funds is given to persons pardoned after a miscarriage of justice as in *A. Beck's case* (Parl. Pap., Cmd. 2315); as the result of that episode provision was made for the creation of a Court of Criminal Appeal by the Criminal Appeal Act, 1907.

<sup>4</sup> 7 & 8 Geo. IV, c. 28, s. 13.

<sup>5</sup> 7 Ed. VII, c. 23.

the assistance of the Court on any point arising out of the petition.

This Court may, on appeal made under conditions prescribed by the Act, on grounds of law or fact, set aside a conviction or modify a sentence. The Court can thus do what the Crown could not do—turn a verdict of guilty into a verdict of acquittal. Pardon, however ample, assumes that an offence has been committed; but the Court can say that there is no occasion for pardon because there was no offence.

*(c) The internal well-being of the country*

It is under this head that the miscellaneous character of the duties of the Home Office is most apparent. Some of these have been taken away by the creation of a Secretary of State for Scotland, of a Ministry of Agriculture, and by the increased powers of the Ministry of Health. But even thus we will not attempt to do more than classify roughly the duties without referring to the network of Statutes by which they are imposed. Some concern the general health of the community, whether (1) in respect of studies purporting to increase knowledge of the laws of health, as in the Acts regulating the practice of vivisection; or (2) in respect of the wholesomeness or safety of land or buildings, as in the case of the Acts relating to burials, cremation, petroleum, theatres, and cinematographs; or (3) in respect of persons unable to take care of themselves, as lunatics or habitual drunkards or children to be employed abroad; or (4) in respect of licensing.

Some concern the health and safety of those engaged in particular trades, as in the case of the Explosive Substances Act, the Factory Acts, and the limitation of the employment of children and young persons.

Some concern the preservation of things of use and consumption, as the Acts for the preservation of wild birds.

Some touch on education in so far as it is concerned with approved schools or with the employment of children in factories and mines.

A very important function, that of elections and registration, has been transferred to the Home Office from the Ministry of Health.<sup>1</sup>

<sup>1</sup> 9 & 10 Geo. V, c. 21, s. 3 (3), (4); S.R. & O., 1921 (No. 959), p. 291.

Although the creation of new departments has relieved the Home Office from some portion of its miscellaneous duties, yet the tendency of legislation is to increase the minuteness, complexity, and volume of those which remain. The series of Factory Acts will serve to illustrate this. And if this last group of duties was wholly removed, the Home Secretary would still be the chief organ for the expression of the royal will in administration, the Minister responsible for the maintenance of the King's peace and for the exercise of the prerogative of mercy.

### § 5. LOCAL GOVERNMENT<sup>1</sup>

The topics assigned to local authorities show a constant tendency to increase in number and complexity. The administration of public assistance, which replaces the Poor Law, that is, the rendering of relief to persons unable or unwilling to support themselves; of the laws relating to public health; of the licensing laws; the maintenance of a police force; of highways and bridges; the provision of asylums for persons of unsound mind; the acquisition of land for small holdings, and, generally, the administration of the law relating to such holdings, to allotments, open spaces, and public footpaths—all these are the subject-matter of local government, nor is the list exhaustive.

Education in all its branches is also committed to the charge of local authorities, though here the councils concerned are able to avail themselves to some extent of outside assistance from persons willing to serve on Education Committees, or assist in other branches of the work.

We are here concerned with the relation of local authorities to the central government, and the topics of local government concern us only in so far as they illustrate this relation, or bring into play the action of different departments. But we must needs first consider the two great divisions of local government, rural and urban, and the matters with which they are mainly concerned.

<sup>1</sup> For obvious reasons of space and proportion we have confined what we have to say on Local Government to England. It may be enough to mention that Scottish Local Government was remodelled in 1929 (19 & 20 Geo. V, c. 25) and is controlled by a Department of Health. The system of Northern Ireland has not yet been so completely revised.

*Rural Local Government*

One can but sketch in the barest outline the history of local government in what are now known as rural areas down to the great change effected by the Local Government Act of 1888. In the Saxon scheme of local government the township, or vill, stands at the bottom of the scale; feudalized later into some sort of correspondence with the manor, though the vill might include more than one manor, and the manor in its turn might contain a group of villis. But the duty of the township was to send four men and the reeve to the County Court. Where more than one manor was included in the township this duty was apportioned among the respective lords; and thus the township stands out as a unit distinct from the manor.<sup>1</sup>

Above the township came the hundred,<sup>2</sup> a division of the county of much disputed origin,<sup>3</sup> varying greatly in size in different parts of England, and the hundred had a Court, and certain communal duties; but these have long passed into abeyance.

So, too, had the work of the County Court—the shire moot wherein the business of the freeholders, judicial, civil, ecclesiastical, and military was conducted before the three presiding officers, the sheriff, the bishop, and the ealdorman.<sup>4</sup> But we need not follow the vicissitudes of the County Court; it is enough to say that for all practical purposes of administration the County Court, like that of the hundred, had ceased to exist.

The great mass of the administrative work of a county, created by a long series of statutes, had been imposed upon the justices of the peace, sitting in quarter or special sessions; but the justices, though the most important element in county administration, formed but one of many authorities to whom the business of a rural area was assigned. The Parish, with its overseers, the Union with its Board of Guardians, the

<sup>1</sup> Pollock and Maitland, *Hist. of English Law*, i. 547, and ch. iii, § 7.

<sup>2</sup> The division is termed a *wapentake* in the counties of York, Lincoln, Derby, and Nottingham, and a *ward* in the northern counties.

<sup>3</sup> Cf. Vinogradoff, *English Society in the Eleventh Century*, p. 100; *The Growth of the Manor*, p. 144; H. M. Cam, *The Hundred and the Hundred Rolls* (1930).

<sup>4</sup> Stubbs, *Const. Hist.* i. 117.

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Sanitary authority or Local Board, the Highway Board, the Burial Board, the School Board combined to distract and confuse the legislator, the administrator, and the student.

The administrative bodies for purposes of rural local government, since the legislation of 1888 and 1894, are the Parish Meeting or Council, the District Council, the Administrative County, and, for certain purposes, the Justices of the Peace.

(a) *The Parish Meeting or Council* .

The Parish may be described as an interloper in our system of local government, as usurping the place which the township or vill should rightfully occupy. The Parish was mainly an ecclesiastical institution until 1601—when the provision for relief of the poor was taken up by the State and imposed as a duty upon the localities concerned.<sup>1</sup> The assembly of the parish had been used to meet to choose churchwardens and transact such business as was necessary for the maintenance of the services, fabrics, and ornaments of the church and to levy a church rate. This organization was ready to hand when a rate was ordered to be levied for the relief of the poor, and the administrative duties connected therewith were assigned to the churchwardens and to overseers nominated by the vestry<sup>2</sup> and appointed by the justices of the peace.

In the south of England, where parish and township were for the most part conterminous, this legislation worked easily: but in the north, where parishes were of great extent and might comprise several townships, difficulties arose. These were met by making the township the parish for poor-law purposes, and thus the civil parish came into existence.<sup>3</sup> And so the parish becomes an administrative unit; and, for purposes of local government, means a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed.<sup>4</sup> The framers of the Act of 1894 adopted this definition of a parish and, confining the opera-

<sup>1</sup> 43 Eliz. c. 2.

<sup>2</sup> This originally included parishioners generally, but in many cases its power was transferred to a select vestry of twelve to twenty-four members, holding office for life, vacancies being filled by co-option; E. Trotter, *Seventeenth Century Life in the Country Parish* (1919), p. 18.

<sup>3</sup> 14 Car. II, c. 12. <sup>4</sup> Interpretation Act, 1889 (52 & 53 Vict. c. 63).



tion of the Act to rural parishes, made provision for such a rectification of boundaries as would prevent any parish from extending into more than one administrative county. The rural parish thus constituted was endowed with local self-government through the agency of a Parish Meeting; and, where the population amounted to 300 or more (in certain cases with smaller numbers), of a Parish Council. The Parish Meeting consists of the parochial electors who are persons on the register for local government:<sup>1</sup> this body must meet annually, or, if there is no Parish Council, twice in the year, and one meeting must take place on or within seven days of 25 March.

Every parish must have a Parish Meeting; every parish with a population of 300 or more must have a Parish Council. If its population is 200 or more it may obtain a Council, as of course, on application to the County Council: if its population is less than 200, the consent of the County Council is needed as well as the request of the Parish. The County Council fixes the number of Councillors, which may vary from five to fifteen, and the Council, which holds office for three years,<sup>2</sup> is bound to meet four times a year.

Its business is the annual appointment of a chairman; the charge and management of the non-ecclesiastical property and documents of the parish: the hiring of land for allotments and small holdings, either by arrangement, or, with the consent of the County Council, by compulsion; the treatment of some minor sanitary matters; and, with the assent of the Parish Meeting, the enforcement of the Adoptive Acts. In furtherance of these purposes, apart from the expenses incident to the Adoptive Acts,<sup>3</sup> a Parish Council may levy, on its own authority, a rate of 4*d.* in the £1 or of 8*d.* with the assent of the Parish Meeting.

### *(b) The District Council*

Next above the Parish Council comes the District Council. The Rural District Council takes its origin in the Poor Law

<sup>1</sup> The franchise is given to occupiers, as owners or tenants, of land or premises, and to wives or husbands of occupiers, including service occupiers of premises and lodger tenants of unfurnished rooms; 18 & 19 Geo. V, c. 12, s. 2.

<sup>2</sup> 23 & 24 Geo. V, c. 51, s. 50.

<sup>3</sup> These are set out in 23 & 24 Geo. V, c. 51, s. 305; the Baths and Wash-houses Acts, 1846 to 1925; the Burial Acts, 1852 to 1906; The Public Improvements Act, 1860; and the Public Libraries Acts, 1892 to 1919.

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Union, or group of parishes united for the administration of the Poor Law, the creation of the Poor Law Amendment Act of 1834. The Union had been made the Sanitary Authority under the Public Health Act, 1875, but, as that Act divided the country into rural and urban districts, the Union or Board of Guardians as a Sanitary Authority was liable to be cut in two if, as a Poor Law Authority, it was partly rural and partly urban. The Local Government Act of 1894 turned this authority into the District Council, and made provision that each District Council should be kept within the limits of an administrative county.

The Guardians of the Poor had contained a large *ex-officio* element—the Justices of the Peace—and had been elected on a franchise which proportioned the number of votes which each elector might give to the amount at which he was rated to the relief of the poor. The *ex-officio* element was struck out, and no elector was given more than one vote.

The District Council was now the Board of Guardians, the Sanitary Authority, and the Highway Authority for its area, and had also taken over certain miscellaneous administrative powers hitherto enjoyed by the Justices of the Peace, as to the granting of licences other than licences for the sale of alcoholic drink, and other matters.

But under the reorganization of local government public assistance<sup>1</sup> and the main control of highways<sup>2</sup> have passed to the County Council.

The District Council had grown out of two institutions, each comparatively new, the Guardians of the Poor and the Rural Sanitary Authority; but the County Council takes us back to the shire moot of early days, though we must not suppose that the Council of the modern administrative county has much to do with the old county organization.

### (c) *The County Council*

The shire moot is the home of our representative institutions. Thither in Saxon and feudal times came the great lords and ecclesiastics of the shire, the knights and freeholders; the twelve lawful men from each hundred; and, from each

<sup>1</sup> 20 & 21 Geo. V, c. 17, s. 2.

<sup>2</sup> 19 & 20 Geo. V, c. 17, ss. 29–32.

township, four men, the reeve, and the parish priest. There justice was administered, taxation was assessed, the business of the shire transacted. But in feudal times the presiding officers underwent a change, the ealdorman ceased to exist; the Bishop attended at full sessions of the court, but ceased to be a presiding officer after the severance of the ecclesiastical and civil jurisdictions. And gradually the business of the County Court came to be dealt with elsewhere. Its functions for purposes of taxation and the discussion of matters of general concern practically ceased when representatives of shire and town were sent from the County Court to deal with these matters in Parliament. The King's justice, civil and criminal, effaced the local jurisdiction. Until 1872 the knights of the shire were formally elected in the County Court, and until 1880 the Coroner, who held the pleas of the Crown, was also there elected. These survivals were swept away by the Ballot Act of 1872 and the Local Government Act of 1888. Perhaps the only thing that could now happen to a man in the ancient County Court is the proclamation of his outlawry.

The administrative and judicial work of the county, which might have been done by a representative body, passed by a long series of Statutes to the Justices of the Peace, officers appointed by royal commission, usually by the Chancellor on the nomination of the Lord Lieutenant of the county, sometimes directly by the Chancellor. We may find that the Justice of the Peace is a more important personage when we deal with the Courts, for the judicial functions have survived the administrative. The most important of these last were the management of county finance, of the county police, and the grant, at special sessions, of licences for the sale of intoxicating drinks. This last, which is regarded as partly a judicial function, remains to the justices; the management of the police, as we shall see, is shared with the representatives of the County Council; the rest of the administrative work is, with very trifling exceptions, transferred to the Council. But the old county organization survives, not only in the Justice of the Peace, but in the great officers of the County, who have duties which are distinct from those of the *administrative County*.

*The Sheriff* has from the earliest times represented the

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central authority in the execution of the law. Thus he is the returning officer to whom writs are sent for the return of members for the Parliamentary divisions of the County. He fixes the days for nomination and polling, and informs the Clerk of the Crown as to the persons elected: he summons juries, and through his under-sheriff and bailiffs, for whose torts he is liable, executes the judgments of the superior Courts in respect of persons or property within the county. With a jury the under-sheriff assesses unliquidated damages awarded by the High Court. Every year, on the morrow of St. Martin's Day, three landowners of the county are selected by the Chancellor of the Exchequer, the Judges, and other officers of State sitting in the King's Bench Division of the High Court of Justice. The choice of one out of the selected three is made by the King in Council, and the Sheriff is appointed by a warrant signed by the Clerk of the Council.<sup>1</sup>

*The Lord Lieutenant* came into existence in the reign of Henry VIII; in the following reign he took from the Sheriff the control which the latter had exercised over the military forces of the County. The military reforms of 1871<sup>2</sup> took from him the command of the Militia, the Yeomanry, and the Volunteers, but the Territorial Forces Act of 1907 brings him again into prominence in his relation to local reserve forces. Beyond this he appoints deputy lieutenants,<sup>3</sup> and, with the aid of an Advisory Committee, submits names to the Lord Chancellor of persons suitable to be placed on the Commission of the Peace.

*The Custos Rotulorum* is the Keeper of the Records and the principal Justice of the Peace for the County. The office is almost always held by the Lord Lieutenant, but separate patents are made out for each office. The Lord Lieutenant is appointed by powers conferred on the Crown by the Militia Act, 1882,<sup>4</sup> and recited in the patent. The King appoints to the more ancient office of Custos Rotulorum by virtue of Common Law Prerogative.

*The Coroner's* office is one of great antiquity: originally he

<sup>1</sup> 50 & 51 Vict. c. 55.

<sup>2</sup> 34 & 35 Vict. c. 86, s. 6. On this office and its antecedents see G. S. Thomson, *The Lords Lieutenants in the Sixteenth Century* (1922); A. H. Noyes, *The Military Obligation in Mediaeval England*, pp. 48, 112, 167.

<sup>3</sup> 45 & 46 Vict. c. 49, ss. 30, 33-5, 52, 53.

<sup>4</sup> 45 & 46 Vict. c. 49, s. 29.

held pleas of the Crown, arrested criminals, and exercised other important functions. Now he holds inquests as to treasure trove and, with a jury of from seven to eleven inquests in cases of sudden death.<sup>1</sup> He was formerly elected, except in certain cases, by the freeholders of the county. He is now appointed by the County Council.

Thus we have the connexion of rural administration with central government established, up to a certain point, by these ancient offices. The Sheriff for the execution of the decision of the Courts, as the immediate representative of the Crown: the Lord Lieutenant for the local reserve of military force: the justices of the peace for a mass of judicial business, and the quasi-judicial business concerned with the licensing laws: the Coroner in certain cases where the King's peace or the King's interests may be concerned.

But a popularly elected body, the County Council, now transacts the general business of the county, including most of the work which was formerly done by the Justices of the Peace, and a good deal more. And this Council is kept in close and constant relation to the central Government. The Local Government Act of 1888 created the *administrative county*. This administrative area does not always coincide with the area of the ancient county, or the county for judicial and Parliamentary purposes:<sup>2</sup> and there is a considerable number of large towns<sup>3</sup> which have been constituted administrative counties, or county boroughs: these are for most purposes separate from the county in which they are geographically situate, and their councils possess not merely the powers enjoyed by a Municipal Corporation, but also the powers of a County Council under the Act of 1888.

A County Council consists of a chairman and vice-chairman, aldermen, and councillors. The Minister of Health fixes the number of councillors, and the electoral divisions of the county: each division returns one councillor, and the quali-

<sup>1</sup> See 16 & 17 Geo. V, c. 59.

<sup>2</sup> Apart from London and the Scilly Islands, there are sixty-one administrative counties in England and Wales, for Yorkshire and Lincolnshire are each divided into three, and Sussex and Suffolk into two administrative areas, while the Isle of Wight is severed from Hampshire, the Soke of Peterborough from Northamptonshire, and the Isle of Ely from Cambridgeshire.

<sup>3</sup> There are now eighty-three county boroughs.

fication of the elector is now the ordinary local government qualification set out above.<sup>1</sup> A councillor must (1) be a local government elector; or (2) own freehold or leasehold in the area; or (3) have resided there for twelve months preceding the election.<sup>2</sup>

The aldermen are one-third in number of the councillors; their qualification is the same as that of councillors. They are elected for six years; councillors for three.

The duties of the County Council can only be shortly touched on. The finance of the county, the appointment and removal of the officers of the county (except the Clerk of the Peace and the justices' clerks), the provision for pauper lunatic asylums, and approved (formerly reformatory and industrial) schools, the charge of bridges, the grant of licences for music, dancing, and racecourses, are perhaps the more important of the duties taken over from the Justices of the Peace. From the highway authorities came the charge of the main roads; the control of all roads in principle is conferred by the Local Government Act, 1929.

The control of public assistance is taken over from the Boards of Guardians.<sup>3</sup>

An important power conferred in the Act of 1888<sup>4</sup> was that of making by-laws either 'for good rule and government' or 'for the prevention and suppression of nuisances'. Powers were also given by the Public Health Act, 1875.<sup>5</sup> Such by-laws now must be confirmed by the Home Secretary or the Minister of Health according to the subject-matter.<sup>6</sup>

By the Education Act of 1902, which has been supplemented by an Act of 1918, and consolidated in 1921, the County Council is brought into contact with another department of the central Government—the Board of Education. The County Council is the Local Education Authority for purposes of elementary education throughout its area, except for elementary education in the case of boroughs of 10,000 and urban districts of 20,000 inhabitants.<sup>7</sup> It is also, without

<sup>1</sup> 23 & 24 Geo. V, c. 51, s. 12; see p. 35, note 1, *ante*. The election falls in March (s. 9).

<sup>2</sup> 23 & 24 Geo. V, c. 51, s. 57.

<sup>3</sup> 17 & 18 Geo. V, c. 4; 20 & 21 Geo. V, c. 17.

<sup>4</sup> 51 & 52 Vict. c. 41, s. 16.

<sup>5</sup> 38 & 39 Vict. c. 55, ss. 102–87.

<sup>6</sup> 23 & 24 Geo. V, c. 51, ss. 249–53.

<sup>7</sup> 2 Ed. VII, c. 42, s. 1; 8 & 9 Geo. V, c. 39; 11 & 12 Geo. V, c. 51.

these exceptions, the authority for higher education. The Council must, however, delegate all its powers in this respect, other than that of raising a rate or borrowing money, to a Committee, on which there must at least be a majority of members of the Council, and on which experts and women must be placed. Subsequent enactments<sup>1</sup> have made this authority responsible for the medical inspection of children, and have given powers to provide meals for children under certain conditions.

It will be seen that as regards elementary education a County Council has duties cast upon it of a definite character which the Board of Education has the means of enforcing. In respect of higher education the duty is clearly enjoined by the Act of 1921, but public schools, training colleges, and other institutions are already in possession of a part of the ground.

Nevertheless the counties set themselves in nearly all cases to frame schemes and carry them into effect so as to raise the standard and co-ordinate the branches of education within their areas, while the Board of Education, by means of the funds placed at its disposal for higher education, exercises a far-reaching influence on local action. Regulations governing the distribution of these funds may act as a guide or as a check to the local authority, which is certain to be glad of pecuniary assistance.

Yet another Government department is now brought into close relations with County Councils by the Small Holdings Act of 1908.<sup>2</sup> By this Act the Councils were required to frame schemes for small holdings within their areas, to invite applications for such holdings, to acquire land for the purpose, and to assume the position of landlords on a large scale, under pain of having the process effected for them by the Ministry of Agriculture.

Subsequent legislation has extended their powers; they may aid co-operative societies to promote such holdings.<sup>3</sup>

We thus find two authorities for the county, the one

<sup>1</sup> 11 & 12 Geo. V. c. 51, s. 80 (1), (2); S.R. & O., 1925 (No. 835), p. 282.

<sup>2</sup> 8 Ed. VII, c. 36; 9 & 10 Geo. V, c. 59, ss. 9, 12; 16 & 17 Geo. V, c. 52, s. 2.

<sup>3</sup> 9 & 10 Geo. V, c. 59, s. 25, Sch. 2; 16 & 17 Geo. V, c. 52, s. 21, Sch. 1.



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administrative the other mainly judicial, discharging their respective functions side by side, and at times brought into joint action.

The County Council, a corporate body, elected, and representative, stands in necessary relations to the Home Office, the Ministry of Health, the Board of Education, the Ministry of Agriculture, and to the Privy Council: it is brought into contact for various purposes with District and Parish Councils.

*(d) The Justices of the Peace*

The Justices of the Peace exercise summary jurisdiction at general petty sessions, and at special sessions administer the law as to the licensing of premises for the sale of alcoholic liquor. At Quarter Sessions they try indictable offences, hear rating and licensing appeals; they appoint a Visiting Committee to visit the Prison, and report thereon from time to time to the Home Office, and a Licensing Committee for the purposes of the Act of 1904.<sup>1</sup> Their connexion with the central Government is through the Chancellor, by whom they are appointed and may be dismissed, and the Home Secretary in respect of the administration of justice, of the Prison rules, and the licensing laws.

But there is a meeting-point of these two county authorities in the, annually appointed, Standing Joint Committee, a body composed of representatives of the Justices and the Council. This Committee is responsible for the police force of the county. It appoints the Chief Constable subject to the approval of the Home Office, fixes the number of the police force, is responsible for the maintenance of the police stations and assize courts, and appoints the Clerk of the Peace, who may be also the Clerk of the County Council.<sup>2</sup>

We may summarize roughly the distribution of public work in a county. The District Councils are the public health authorities; the Justices of the Peace are responsible for the administration of justice and of the licensing laws; the Standing Joint Committee are the authority for the police force; the rest of local administration, an ever-growing burden, falls on the Council of the County.

<sup>1</sup> 4 Ed. VII, c. 23. The liquor licensing Acts are consolidated in 10 Ed. VII and 1 Geo. V, c. 24. \*      <sup>2</sup> See 23 & 24 Geo. V, c. 51, ss. 100, 121.



*Urban Local Government*

The history of the borough is a long one, and we will only indicate some of its landmarks.

The *burh* or walled town of Saxon times became the chartered borough of the Norman kings, which bought exemption from the assessment and jurisdiction of the shire.<sup>1</sup> From the end of the reign of Henry III such charters are not infrequent, all pointing to the same objects—the exclusion of the Sheriff, the election by the town of its own magistrates, and the determination of its own pleas apart from the County Court.<sup>1</sup>

The constitution of these towns greatly varied, but from the reign of Henry VI onwards the tendency of charters which either conferred or regulated corporate rights was to diminish the rights of the townsmen and to increase those of the magistracy. The mayor and aldermen, or the corporate governing body, acquire the rights which had belonged to the freemen at large. More especially is this the case where a charter confers the right to return members to serve in Parliament.<sup>2</sup>

While the King retained the power of appointing and dismissing the judges by whom the validity of these charters might be tried, the boroughs which returned members to the House of Commons were always liable to have their charters questioned, annulled, and remodelled to suit the political requirements of the King. The dealings of Charles II and James II with the borough charters are significant on this point. But in 1701 the Crown lost its control over the judges, and in 1832 the borough representation was settled by Statute.<sup>3</sup> In 1835 the confused and multifarious borough constitutions were dealt with by the Municipal Corporations Act:<sup>4</sup> a model constitution was designed for corporate boroughs, and to these all existing incorporated boroughs, and such as might hereafter be chartered, were made to conform. The substance of this Act and of numerous amending Acts was consolidated in the Municipal Corporations Act, 1882,<sup>5</sup> and this Act is amended in important respects by the Local Government Act, 1933.

<sup>1</sup> Stubbs, *Const. Hist.* i. 408–12.

<sup>2</sup> *Ibid.*, ii. 217, 219.

<sup>3</sup> 2 & 3 Will. IV, c. 45.

<sup>4</sup> 5 & 6 Will. IV, c. 76.

<sup>5</sup> 45 & 46 Vict. c. 50.

But a town need not be a *municipal borough* in order to possess an organization distinct from that of the county. It may be an *urban district*. The Public Health Act, 1875, divided all England and Wales into sanitary districts, rural or urban, and the Urban Sanitary Authority or Local Board, which was constituted in 1875 for carrying out the provisions of the Public Health Act, has become the Urban District of the Local Government Acts of 1894 and 1933.

The Municipal Corporation is constituted by royal charter, granted by the King with the advice of the Privy Council, formerly on petition of the resident householders of the town, now on petition of the council of a rural or urban district.

The Corporation consists of the burgesses, that is, the rate-payers, a mayor, and aldermen. It acts through the Council, consisting of mayor, aldermen, and councillors. The burgesses elect the councillors, the councillors elect the aldermen, and the entire Council elects the mayor.

The Council so constituted administers the corporate property of the borough. Where the income of this property is insufficient to meet local purposes, a rate may be levied, and a return of income and expenditure for each year must be laid before the Ministry of Health, though, except as to its education and housing-scheme expenses, the accounts of a municipal corporation are not subject to the audit of the Ministry.<sup>1</sup> For the sale of land forming part of the corporate property, or for raising a loan on the security of that property, the consent of the Ministry<sup>2</sup> must be obtained.

The Urban District is not the creation of the Crown in Council, but is brought into existence and its area defined by the County Council or the Ministry of Health. The County Council in this respect has large powers which the Ministry may control on the petition or by the consent of local authorities.

The Urban District is essentially a sanitary authority, but despite the general transfer of highways to the County Council,

<sup>1</sup> But a borough may adopt the district audit system; if not it can have a professional audit; otherwise two elected ratepayers and a nominee of the mayor act; 23 & 24 Geo. V, c. 51, s. 247.

<sup>2</sup> Substituted for the Treasury (as in the Municipal Corporations Act, s. 106) by s. 72 of the Local Government Act, 1888. Cf. 23 & 24 Geo. V, c. 51, s. 172.

by delegation, it is also, within its area, a highway authority ; if it has a population of more than 20,000 it is an authority for elementary education, and it possesses some other miscellaneous administrative powers.

A municipal borough is also an urban sanitary authority, and we may thus compare the borough and urban district as respects their constitution and powers. We have described the different ways in which these two corporate bodies come into existence: the urban district council is more democratic in composition since it possesses no aldermen: as regards powers, the urban district council does not, under any circumstances, control its own police; a borough, if of more than 10,000 inhabitants, may do so; nor has an urban district ever a separate Commission of the Peace, as may be the case with a borough. For all purposes of carrying out the laws of health the two forms of urban government possess the same powers, but the by-law-making power of the urban district is governed by the Public Health Acts, and its exercise is entirely under the control of the Ministry of Health,<sup>1</sup> while a municipal corporation may also make by-laws for the good rule and government of the town, which are submitted for confirmation to the Home Secretary.<sup>2</sup>

The urban district has the power to impose a district rate, and in respect of raising money by loan is placed on the footing of a municipal corporation, but its accounts are subject to the audit of the Ministry of Health.

Urban, as compared with rural, local government lacks completeness. Neither the urban district council nor the municipal borough administered the Poor Law. Side by side with the urban district council was the Board of Guardians, who were, since 1894, entirely an elected body. The Parish also was unchanged in urban districts. The sequence of Parish, District, and County Council, and the identity of the Guardians of the Poor with district councillors was confined to rural districts. Nor has the abolition of Guardians altered the position.

The relation of borough or of the urban district to the county in which it is situate needs to be noted.

<sup>1</sup> 38 & 39 Vict. c. 55, s. 187, and now 23 & 24 Geo. V, c. 51, s. 250.

<sup>2</sup> 45 & 46 Vict. c. 50, s. 23, and now 23 & 24 Geo. V, c. 51, s. 249.

The County borough is an administrative county of itself, and is practically outside the county area.<sup>1</sup> Hence restrictions on the creation of such boroughs are now imposed,<sup>2</sup> a minimum population of 75,000 being demanded. The boroughs which are not county boroughs may be divided into those which have a population of 10,000 and upwards, and those which fall below that number.

Those which are above 10,000 may again for certain purposes be subdivided into those which have a separate commission of the peace, with or without a separate Court of Quarter Sessions, and those which have not. But the division in respect of population is important in two respects.

The boroughs with the larger population are independent of the county in respect of the maintenance of a police force, which is raised by the borough and controlled by its Watch Committee. But the Home Office has worked steadily to secure consolidation of police forces. They are also independent as regards the provision of elementary education for the children within their area.

The urban district council has similar independence as regards education if the population of the area exceeds 20,000.

With these and some other less important exceptions, it may be said that the non-county borough and urban district are parts of the administrative county in which they are situate.

Before leaving the subject of urban government it may be worth taking note of urban terminology.

*Town* is a term of very indefinite use. Blackstone says<sup>3</sup> that a town or township is synonymous with tithing or vill, and consists in the possession of 'a church with divine service, sacraments, and burials'; this he admits to be an ecclesiastical rather than a civil distinction, but he offers no other. He negatives the possession of a market as the distinguishing feature of a town, and suggests that it consisted in a *tithing* or group of ten families; but this was an association for police purposes. *City* used to be defined as a town which possessed or had possessed a cathedral, but it is now merely a term of

<sup>1</sup> There are eighty-three such boroughs.

<sup>2</sup> 23 & 24 Geo. V, c. 51, s. 139.

<sup>3</sup> *Comm.* i. 115.

distinction sometimes conferred on great towns by letters patent, as upon Birmingham and Dundee.<sup>1</sup> There is no rule that a city shall have a lord mayor; this depends on royal grant.

*Borough* was formerly defined as a town, corporate or not, which sent members to Parliament, but the term is now properly applied to boroughs incorporated under the Municipal Corporations Act; or under Part VI of the Local Government Act, 1933.

The county corporate was a town placed by royal favour in the position of a county, such as still are Berwick, Carmarthen, or Haverfordwest, being exempt from the jurisdiction of the shire, possessing a sheriff of its own, having a separate commission of oyer and terminer and gaol delivery for the trial of offences committed within its boundary, and being for parliamentary purposes in a somewhat different position from other towns. But legislation as to municipal powers and on the subject of the franchise has reduced the distinction of these ancient borough counties to something merely nominal, but most have become county boroughs.

There remain the county boroughs of the Local Government Act, 1888. These are boroughs which either possess a population of not less originally than 50,000, or now 75,000, or having a large population were also counties corporate. In these the mayor and council, as constituted by the Municipal Corporations Act, are invested with such larger powers as are conferred on the council of an administrative county.

#### *Local Government and the Central Executive*

The local administrative bodies which we have described are controlled for most purposes by the Ministry of Health. Similar departments, somewhat differently constituted, exist for Scotland<sup>2</sup> and Northern Ireland,<sup>3</sup> the one presided over by the Secretary of State for Scotland, the other by the Minister for Home Affairs.

We confine ourselves to the consideration of English local government, and will note very briefly the history of the

<sup>1</sup> *London Gazette*, 18, 29 Jan. 1889.

<sup>2</sup> 57 & 58 Vict. c. 58, now 19 & 20 Geo. V, c. 5.

<sup>3</sup> 35 & 36 Vict. c. 69, and 61 & 62 Vict. c. 37.

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duties as to the Poor Law, as to the creation of local administrative bodies, and as to public health, which were assigned to the central department, then the Local Government Board, in 1871.<sup>1</sup>

(a) *The Poor Law (Public Assistance)*

The administration of the Poor Law Amendment Act of 1834<sup>2</sup> was vested in Commissioners appointed for a term of five years. This commission was renewed annually from 1839 to 1842, and was then reappointed for five years. Its existence without a Parliamentary chief was not altogether happy,<sup>3</sup> and in 1847 a Poor Law Board was constituted, consisting, like other phantom Boards, of various great Officers of State, who with others nominated by the Crown were made, by letters patent, Commissioners 'for administering the relief of the poor in England'. One of these Commissioners was to be styled the President; the Commissioners were to appoint two Secretaries, and the office of President and of one of the Secretaries was made compatible with a seat in the House of Commons.

The President of the Poor Law Board with the Parliamentary Secretary was responsible to Parliament for the administration of the Poor Law from 1847 to 1871, and the office of President was held from time to time by a minister of Cabinet rank. In 1871 the Poor Law Board ceased to exist, and its powers and duties were vested in the Local Government Board, which in 1919 gave place to the Ministry of Health.

(b) *Public Health*

Until the year 1847 there was no general legislation on sanitary matters.<sup>4</sup> The Municipal Corporations Act, 1835, gave power to the towns, which were or might hereafter be included in it, to make by-laws on various local matters, including the prevention of nuisances. Moreover, certain towns obtained special Acts of Parliament to enable them to carry out improvements. These Acts specified the improvements and the local Commissioners by whom the improvements

<sup>1</sup> 34 & 35 Vict. c. 70.

<sup>2</sup> 4 & 5 Will. IV, c. 76.

<sup>3</sup> Bagehot, *English Constitution*, p. 189.

<sup>4</sup> See Bannington, *Public Health Administration*.

were to be effected and maintained. In 1847 were passed the Improvement Clauses Act and the Commissioners Clauses Act.<sup>1</sup> These Acts supplied common forms, the one for the election, meeting, powers and duties of the local improvement Commissioners, the other for the nature, mode of execution, and machinery for payment in respect of the improvements contemplated. Thus it was possible to make the local improvement Acts uniform and efficient.

In 1848 was passed the first Public Health Act.<sup>2</sup> This Act empowered local authorities to deal with many matters relating to health, drainage, water supply, removal or prevention of nuisances, offensive trades, street paving, common lodgings, burial-grounds.

The powers so created might be exercised by three different bodies. The Town Council, where the town was incorporated under the Municipal Corporations Act; the Improvement Commissioners, where these existed apart from a municipal corporation; the Local Board, a new institution, which might be brought into existence by Order in Council, on petition of the ratepayers addressed to a newly constituted Board of Health, or on the initiative of this Board where the sanitary arrangements of a district were especially bad. The Board of Health, variously constituted, acted as a central authority in sanitary matters for ten years, from 1848 to 1858, when it was allowed to expire. Its functions as regards the prevention of diseases were assigned to the Privy Council, while those which related to the constitution of Local Boards fell to the Home Office, under the provisions of the Local Government Act of 1858.<sup>3</sup>

This Act amended the provisions of the Public Health Act, 1848, mainly as to the constitution and powers of the local authorities. The intervention of the Privy Council was no longer needed for their creation. A resolution of the Town Council in case of a municipal corporation; a resolution of the Improvement Commissioners in a town which was under a local improvement Act; a resolution of the ratepayers in places which had neither a Town Council nor an improvement Act, but did possess a defined boundary;<sup>4</sup> might be laid

<sup>1</sup> 10 & 11 Vict. cc. 16, 34.    <sup>2</sup> 11 & 12 Vict. c. 63.    <sup>3</sup> 21 & 22 Vict. c. 98.

<sup>4</sup> A place which did not possess a known boundary had to petition the  
3042-2

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before one of His Majesty's Principal Secretaries of State, in practice the Home Secretary. A vote of the ratepayers so signified to the Home Secretary, and published by him in the *London Gazette*, was enough to constitute the Local Board. The exercise of their powers by these Boards were controlled by a sub-department of the Home Office, called the Local Government Act Office.

From 1858 to 1871 the Home Office created and controlled local sanitary authorities, and the Privy Council enforced sanitary rules. This arrangement proved cumbrous in working. The functions of government connected 'with the supply of requisites for public health as at present regulated, after wandering through a labyrinth of local authorities, may be traced up to no fewer than three chief offices, the Privy Council, the Home Office, and the Poor Law Board; whilst certain collateral matters find their way to the Board of Trade'. So ran the report of the Sanitary Commission of 1869.

In 1871 the duties of Home Office and Privy Council alike were assigned to the newly constituted Local Government Board. In 1872 the whole of England and Wales was divided into rural and urban sanitary districts.<sup>1</sup> In the former the Board of Guardians constituted the local sanitary authority: in the latter the Local Board above described.

In 1875 the Public Health Act<sup>2</sup> consolidated the law upon the subject, and gave increased powers to the Local Government Board for creating and dissolving local sanitary authorities, for defining or changing their boundaries, and merging one district with another or turning that which was rural into urban, for instituting inquiries and compelling defaulting authorities to do their duty, either on its own initiative or at the instance of persons aggrieved.<sup>3</sup> The district Council has now become the rural sanitary authority, and in towns either the Urban District Council or the Municipal Corporation administers the laws relating to Public Health.

Home Secretary to settle its boundaries before it could proceed to the constitution of a local authority.

<sup>1</sup> 35 & 36 Vict. c. 79.

<sup>2</sup> 38 & 39 Vict. c. 55.

<sup>3</sup> The early history of sanitary legislation, from the point of view of the expert in sanitary matters, is fully set forth in *English Sanitary Institutions* (1890) by Sir John Simon.



*(c) Central Control*

Local authorities are brought into relations with various departments of government, but the Ministry of Health is the department specially constituted to supervise, aid, and control them.

The forms in which the central control manifests itself are various. The Ministry can inform itself of the action of the local authorities in the administration of the Poor Law, now usually styled public assistance, and the law relating to public health by means of inspection; and the liability to inspection lies at the base of the connexion between local and central government.

The Ministry may, on information thus acquired, or where necessary without special inquiry, make Orders or Regulations as to the mode of carrying out statutory duties imposed on local authorities. These orders are made in pursuance of statutory powers.<sup>1</sup> Where they are general they must lie before Parliament, and may be revoked by Order in Council. Where they are special they relate to some individual default of an authority in the discharge of its duty. Disobedience to an order may result in an application to the King's Bench Division for a *mandamus* to compel performance, but this procedure is rare.

It is well to distinguish from Orders and Regulations of this sort the model By-laws which are from time to time issued by the Ministry. By-laws which may be made by local authorities for purposes of public health must be submitted to the Ministry. It is for public convenience, therefore, that the Ministry publishes model By-laws which serve to indicate the lines on which local authorities may frame their rules without fear of disallowance.

Financial control is exercised in two ways. The accounts of every local authority except those of municipal boroughs<sup>2</sup>

<sup>1</sup> See 4 & 5 Will. IV, c. 76, s. 15; 38 & 39 Vict. c. 58, ss. 130, 134, 139, and practically all subsequent Public Health Acts. Under the many Acts, 1919-35, as to housing the Ministry has been empowered to control local action and to determine the conditions on which grants to aid provision of working-class dwellings at reasonable rates can be made. The Ministry has also wide authority to remodel and approve town-planning schemes drawn up by local authorities under the Town and Country Planning Act, 1932.

<sup>2</sup> They may accept the system of ministerial audit.

are subject to audit, and in the case of these boroughs their housing-scheme and education accounts are not exempt from this process. What the district auditor of the Ministry disallows becomes a surcharge falling upon those who incurred the expenses in question, and this is a substantial check on any departure from the lines within which extravagance is permissible at the cost of the ratepayer of to-day. The check on extravagance which may be a burden in the future is provided by the requirement that the sanction of the Ministry should be given to any loan raised by a local authority.<sup>1</sup> A loan raised without such authority would furnish a very poor security to the lender.

Inspection, Regulation, Audit of accounts, and restraint of borrowing powers are perhaps the main features of central control over local institutions. But they do not exhaust the forms or methods by which the local authorities are brought into contact with the departments of government. Both the Ministry of Health and the Board of Education possess powers of a judicial character for dealing with controversies between one set of authorities and another. Approval of appointments of officers, conditions as to qualifications, restrictions as to dismissal, formation of areas, directions as to procedure, approval of town planning and housing schemes after public local inquiry, are some modes in which a Government department can make itself felt in local affairs. In some respects we may complain of laxity, in others of excessive minuteness, of control. It is enough to point out its general character, and the process by which local independence is combined with a certain homogeneity of institutions and their working.<sup>2</sup>

## II. THE ADJACENT ISLANDS

### § 1. THE ISLE OF MAN

The Isle of Man has been in allegiance to the English Crown since the reign of Henry IV, but subject to its own

<sup>1</sup> 38 & 39 Vict. c. 83; see now 23 & 24 Geo. V, c. 51, pt. ix.

<sup>2</sup> It is unnecessary to annotate this section with the references which a subject so full of technical detail might seem to demand. The reader who wants fuller or more precise information should refer to the latest edition of Clarke or Wright and Hobhouse on *Local Government*, or the various editions of the Local Government Acts of 1888, 1894, and 1933. But for a

laws and the jurisdiction of its own Courts. From the reign of Henry IV until 1735, with an interval during Elizabeth's reign, it was held of the Crown in fee by the House of Stanley. The tenure was on terms of doing homage and presenting two falcons to King or Queen at the Coronation.<sup>1</sup> It then passed by inheritance to the Dukes of Atholl, but in view of the desirability of controlling smuggling the feudal rights were sold to the Crown in 1765, with a reservation of certain manorial rights and of the ecclesiastical patronage. These were bought by the Crown in 1829.<sup>2</sup>

A Lieutenant-Governor represents the Crown in the Island; it is no longer the practice to appoint a titular governor. He is appointed by sign manual warrant, accompanied by a letter of instructions. The police and the officials of the prison are responsible to him, and he appoints to offices in these departments, and also in the militia, a local defensive force of town and parish companies. The Governor himself is responsible to the Home Secretary, without whose permission he cannot leave the Island.

The Legislature of the Island consists of two Houses, the Governor in Council, and the House of Keys; the two sitting in Session make up the Court of Tynwald. The Acts of this body require the assent of the Crown in Council for their validity.

The Imperial Parliament determines the amount of the customs duties. The Imperial Government controls and collects them. If, after meeting the cost of government and contributing £10,000 to the consolidated fund, there remains a surplus, its disposal rests with the Court of Tynwald.

The Council of the Island, under the Isle of Man Constitution Amendment Act, 1919, consists of the Governor, Bishop, Attorney-General, two Deemsters, four members elected by the House of Keys, and two nominated by the Governor; these hold office for four years.

full account of the history of the law of the subject the treatise of Dr. Redlich on *Local Government in England* (ed. Hirst) and the monumental treatise of S. and B. Webb on *English Local Government* furnish the fullest and clearest information now available. See also Macmillan, *Local Government Law and Administration*, i. (1934).

<sup>1</sup> See *Sodor and Man (Bp.) v. Derby (Earl)* (1751), 2 Ves. Sen. 337.

<sup>2</sup> The purchase was sanctioned by 6 Geo. IV, c. 34.

The members of the House of Keys, apparently by origin a judicial body, a fact which goes towards explaining its lack of financial powers, are twenty-four in number. Until 1866 they held seats for life, but could resign with the consent of the Governor. Vacancies were filled by the selection of one from two names submitted by the Governor to the House. The House of Keys Election Act of 1866<sup>1</sup> made its members representative. Six sheadings, corresponding to counties, return sixteen members, the town of Douglas returns five, and three other towns each return one.<sup>2</sup> The duration of the House is five years, unless dissolved earlier by the Governor.

The Deemsters hold weekly courts of criminal jurisdiction, having power to give sentences extending to two years' imprisonment. There is a High Court of Justice whence appeal lies to the Staff of Government, and for criminal causes a Court of General Gaol Delivery and a Court of Criminal Appeal, consisting of one and three judges of the High Court respectively.<sup>3</sup>

The Island is subject to the legislative power of Parliament, but is not bound by Statutes unless specially named therein. The writ of *habeas corpus* runs in the Island, and an appeal lies from the decrees and judgments of the Staff of Government to the Crown in Council.

The Island has a distinctive legal system, the land laws being of Norse origin.<sup>4</sup>

## § 2. THE CHANNEL ISLANDS

There are two governments in the Channel Islands—Jersey, and Guernsey with its dependencies. The immediate link with the central executive consists in each case of a Lieutenant-Governor appointed by the Crown on the recommendation of the Secretary of State for War after consultation with the Secretary of State for Home Affairs. But the powers and duties of these officers are not so extensive as are those of the Lieutenant-Governor of the Isle of Man: the

<sup>1</sup> *Statutes of the Isle of Man*, iii. 372.

<sup>2</sup> The House of Keys Election Act, 1919, make women eligible to sit and vote. There is now adult franchise.

<sup>3</sup> See Judicature Amendment Act, 1921; Criminal Code (Amendment) Act, 1921.

<sup>4</sup> Cf. Farrant, *L.Q.R.* xxxv. 239 ff.

Islands possess legislative and judicial institutions of their own, and are very tenacious of their rights in respect of them.

### *Jersey*

The constitutional history of Jersey is not uninteresting, and may be briefly sketched.

With the other Islands it was a part of the Duchy of Normandy: it passed to the English Crown when the Duke of Normandy became King of England, and remained to the English Crown when Normandy was lost.

The Island was governed by a Warden or Bailiff acting as representative of the King, and occupying very much the position of a Sheriff of an English county, but there seems no evidence of the existence of any popular or representative body corresponding to the County Court. As in the case of the Sheriff his judicial powers were limited, and itinerant justices came from the King's Court to hold pleas of the Crown. In the reign of John a body described as *duodecim coronatores iurati* was entrusted with the custody of the pleas of the Crown, and with them the Bailiff was empowered to try certain suits relating to land. At some later dates these *jurats* were ordered to be chosen, for life, from among the inhabitants of the Island 'per ministros Domini Regis et optimates patriae', and permitted to deal with cases of all sorts except treason, and assault upon the King's Officers.

This body, the Bailiff and jurats, acted not only as a Court, but as a local legislature making by-laws or ordinances in matters of domestic concern relating to markets, prices, police, and public health.

In the reign of Henry VII the position of the Bailiff underwent a change: he had become a nominee of the Captain or Governor of the Island. In fact, the chief executive office of the Norman times had become duplicated. The Warden or Governor was a great personage who entrusted the civil government to a deputy, the Bailiff. These offices were now placed on a more equal footing; both were nominated by the King, the Bailiff was at the head of the local government, the Governor was confined to military and political functions, and represented the external power of the Crown. For the purpose of making Ordinances the Bailiff and jurats from

time to time summoned to their assistance *the States*, consisting of the rectors and constables of each parish. The constables were chosen by the parishioners, and the two bodies would correspond to the estates of the Clergy and the Commons in England.

In due time the States made the inevitable claim to be consulted, not at the pleasure of the Royal Court, but of right; and in 1771 a code of laws for the Island was confirmed by Order in Council,<sup>1</sup> and it was laid down that no laws or ordinances should be passed, either provisionally or with the intention that they should receive the assent of the Crown in Council, unless by the whole Assembly of the States of the Island.

We may now therefore consider the composition and powers of this Assembly of the States.

First there are the nominees of the Crown. The Lieutenant- or Deputy-Governor has a right of veto, but no vote. The Bailiff, who presides, has a casting vote, but no other. The Attorney- and Solicitor-General have a right to be present, and to take part in debate, but have no vote. The *Visconte*, who discharges the executive functions of Sheriff and Coroner, has a seat, but no right to speak or vote.<sup>2</sup>

Next come the members of the Royal Court, the twelve jurats elected for life by the ratepayers of the Island. They must be native islanders, must possess real property of £720 in value, and are prohibited from the exercise of certain trades.

Last come the States: the twelve rectors of the parishes, appointed for life, and holding their seats *ex officio*; the twelve constables of the parishes, holding their seats *ex officio* and their offices for three years from the date of election:<sup>3</sup> the fourteen deputies, three for the parish of St. Helier, and one for each of the others. For these a triennial election is held in the month of December.

The legislative powers of the States are limited. Permanent legislation needs the assent of the Crown in Council. Pro-

<sup>1</sup> 28 Mar. 1771.

<sup>2</sup> Order in Council, 19 Mar. 1824.

<sup>3</sup> The constables are chosen by the *principaux* of their respective parishes; these are parishioners owning property of the annual value of £160 and upwards.

visional Ordinances may be made for local or immediate purposes, and these do not require to be expressly allowed. They do not remain in force for more than three years, but they may be renewed.

But all legislation, permanent or temporary, is subject to the *veto* of the Lieutenant-Governor, or the *dissent* of the Bailiff.<sup>1</sup> The *veto* at once brings the proposed measure to naught. The *dissent* corresponds to the reservation of a Colonial Act by the Governor of a colony. It suspends the operation of measures until the King in Council has considered and allowed them.

The taxing powers of the States are also limited. The *hereditary revenues* of the Crown are collected by a Receiver-General, and applied to official salaries and other purposes connected with the government of the Island.<sup>2</sup> The *general levies*, taxes falling on property, need the sanction of the Crown, unless the money is needed for special and sudden emergency. The *impôts* or duties on wine and spirits are levied under the authority of letters patent of Charles II, which provide for their application to specified local purposes.

The islanders have claimed that neither Act of Parliament nor Order in Council is of force in the Island unless passed with the concurrence of the States. As regards Parliament, the claim is absurd;<sup>3</sup> all that need be said is that Parliament would probably be unwilling to legislate on the domestic affairs of the Island without the goodwill of the States. For this reason the antiquated judicial system of the Island remains unreformed. Acts of Parliament which affect the Island are transmitted thither by Order in Council, which directs that they should be registered and published; but this registration in no way adds to the binding force of the Statute.

There is a more grave dispute as to the right of the Crown to legislate by Order in Council without the concurrence of

<sup>1</sup> Order in Council, 2 June 1786. The Lieutenant-Governor's veto would appear to be available only against temporary measures which might affect Crown interests or the royal prerogative, or Acts of such character; *Jersey States Representation, Re* (1862), 15 Moo. P.C. 195.

<sup>2</sup> The Royal Court cannot order payments from that revenue; *Att.-Gen. of Jersey v. Le Capelain* (1842), 4 Moo. P.C. 37.

<sup>3</sup> Order in Council, 7 May 1806; Keith, *Const. Hist. of First British Empire*, pp. 382, 383.

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the States. It is maintained that no Order in Council may be put in force until it has been presented to the Royal Court for registration; that such registration may be suspended if the Order infringes the ancient laws and privileges of the Island;<sup>1</sup> and further that the making of an Order in Council without the concurrence of the States is an infringement of these privileges.<sup>2</sup>

We need not pronounce upon a question which a Committee of the Privy Council deliberately evaded.<sup>3</sup> It is sufficient to say that the rights of the Crown are asserted, and that they are contested except as regards the exercise of the prerogative of mercy.<sup>4</sup>

The Royal Court, which gradually became not merely a Court of Justice but a local legislature, and was later compelled to share its legislative powers with the States, is still the Island judicature. The Bailiff and jurats are the judges, but the jurats who are elected as members of the legislature do not necessarily know the law; being unpaid, they are under no obligation to learn it, and being elected for life, they are independent of criticism. The Bailiff, who is appointed by the Crown, is always a qualified lawyer, and receives an income from fees and direct payment of £720; but his opinion is of less weight than that of the ordinary

<sup>1</sup> These words are the substance of an Order in Council of 21 May 1679. This was repealed by an Order of 17 Dec. 1679, to the effect that no Orders, save those which related to the public justice of the Island, needed registration for their enforcement. It is alleged that the Code of 1771 repealed the December Order and re-enacted the May Order. Even if this were so—and it seems open to doubt—the States would have to show that the ancient laws and privileges of the Island were infringed by legislation by Order in Council, and this would be difficult.

<sup>2</sup> The issue was raised as regards Orders in Council reforming the administration of justice in Jersey in 1853 (*Jersey States, Re*, 9 Moo. P.C. 185); but a compromise was reached, the Island passing local legislation somewhat on the lines of the Orders. Cf. for Guernsey, *Guernsey States Petition, Re* (1861), 14 Moo. P.C. 368.

<sup>3</sup> The question came again before the Committee of the Privy Council in 1894. An Order in Council had been made in 1891, regulating the Chairmanship of the Prison Board for Jersey. The States declined to register this Order and asked that it might be recalled, alleging among other reasons that the Crown had no power to legislate for the Island without the consent of the States. The Committee of the Privy Council found other grounds for advising the Queen to comply with the wishes of the States. Many documents are printed in St. Tr. (N.S.) viii.

<sup>4</sup> *Daniel, In re*, Order in Council, 12 Jan. 1891.



jurat. He has no vote upon a judicial decision unless the jurats are equally divided: it has even been doubted whether, except under these circumstances, he may express an opinion.

The Court, thus constituted, sits either as a Court of first instance, when it consists of the Bailiff and two or three jurats, the *nombre inférieur*; or as a Court of Appeal, the Bailiff and seven jurats, the *nombre supérieur*.

The Executive in Jersey, and also in Guernsey, is appointed, paid by, and responsible to the Crown. The Lieutenant-Governor directly represents the Crown for all military purposes, and for the exercise of the veto upon legislation. He exercises the prerogative of mercy and of expelling aliens.<sup>1</sup> He is the medium of communication between the Island and the Home Government. In his military capacity he is responsible to the War Office; for other purposes to the Home Office.

### *Guernsey*

The Bailiwick of Guernsey includes the adjacent Islands.<sup>2</sup> The constitution of these differs only in details from that of Jersey. A Lieutenant-Governor represents the Crown here as in Jersey. The Royal Court, or *Chefs Plaids*, consisting of the Bailiff and twelve jurats, exercises legislative and judicial functions. It claims in its legislative capacity at certain sessions to make regulations called *Ordonnances*, which are of force in so far as they do not conflict with an Order in Council, or law emanating from a higher authority. These *Ordonnances* are in theory at least limited to regulations for the better enforcement of existing law. If they go farther they need the assent of the Crown in Council. The Royal Court also formulates legislation which is submitted to the States: if approved by the States the proposed enactment is submitted to the Crown in Council, and if there confirmed becomes law.<sup>3</sup>

The States are representative of the entire community: they consist of two bodies: the larger, for the purpose of electing the jurats, a smaller one for purposes of legislation.

<sup>1</sup> *Guernsey (Bailiff, &c.), Re* (1844), 5 Moo. P.C. 49.

<sup>2</sup> Herm and Jethou are integral parts of Guernsey; *Martyn v. McCulloch* (1837), 1 Moo. P.C. 308.

<sup>3</sup> *Second Report on the State of the Criminal Law in the Channel Islands, Guernsey*, 1847-8, pp. xi-xv.

The larger body, the *États d'élection*, consists of the Bailiff and jurats, the rectors of eight parishes, the *douzeniers*,<sup>1</sup> elected for life by the ratepayers of the eight parishes from among those who have served the office of constable. The number of *douzeniers* sent by each parish varies, but the total number is 180. These, with twenty constables elected by the ratepayers for three years, make up the *États d'élection*.

The *États de délibération* is a smaller body. The *douzeniers*, with the constable, attend personally at the *États d'élection*, but by deputies at the *États de délibération*; the number of deputies is thus reduced to six from the town parish, and nine from the county parishes. Eighteen members are directly elected.

The *États de délibération* may tax within limits, and approve or reject legislation submitted to them from the *Chefs Plaidis*. Their taxation, if it exceed certain limits, and their legislation in any event, need the approval of the Crown in Council.

The Court of Guernsey, like that of Jersey, consists of the Bailiff, and not less than two of the twelve jurats, an unskilled and unpaid body of men, appointed by popular election, for legislative rather than for judicial purposes. It exercises a criminal jurisdiction throughout the Bailiwick, and an appellate jurisdiction from the Courts of Alderney and of Sark.

Alderney has its Court, its States, and its Executive, but the States of Guernsey may legislate for Alderney, subject to disallowance by the King in Council, and an appeal lies from the Court of Alderney to the Court of Guernsey, subject to an appeal to the Judicial Committee of the Privy Council.

Sark, which is a feudal seigniory, has a similar Court with limited criminal and civil jurisdiction. For local purposes it has States, composed in part of the tenants of the old holdings, in part of elected members.

The Channel Islands are in the diocese of Winchester; there are twelve rectories in Jersey, eight in Guernsey, and a perpetual curacy of Alderney, all in the gift of the Crown on the recommendation of the Secretary of State. The Deans of Jersey and of Guernsey hold rectories in their respective Islands.

<sup>1</sup> The *douzaine* is the parish council which provides for the relief of the poor, and the repair of roads, and makes the parochial rates.

In all the islands the common law is derived from the old Norman French law, but there are considerable variations between the systems.

### III. THE COLONIES AND PROTECTORATES

#### § 1. THE COLONIAL OFFICE

The earliest colonies were acquired by conquest or discovery and settlement, and in the latter case were often regulated by a charter granted to a company or an individual. Their connexion with the central government was through the King in Council.

At the Restoration the affairs of the colonies were entrusted to a Committee of the Privy Council, and very shortly after to a Commission created by letters patent. This body expired in 1665, was revived in 1670, and was in 1672 combined with the Council for Trade, but in 1675 the commission, in the interests of economy, was revoked, and the Privy Council resumed the management of colonial business. In 1696 the Commission of 1672 was revived as the Board of Trade and Plantations, akin to but not actually a Committee of Council, the members being paid, but its powers were in practice limited: its duty was to collect information, to report to the King in Council, and to give advice when required. For a short time only (1751-62) under Halifax's instigation was it given effective power to nominate and remove officers. Its most important function—often badly performed—came to be the review of colonial legislation with a view to the exercise of the power of disallowance to safeguard imperial interests. The executive work was done by the Secretary of State for the Southern Department. The Board coexisted from 1768 to 1782 with a third Secretary of State for the Colonies. In 1782 the Board and the third Secretaryship were abolished.<sup>1</sup> Communications from the colonies were to be addressed to the Privy Council, the executive business was transacted through the Home Office, and in 1786 a Committee of the Privy Council was constituted for Trade and Foreign Plantations. This Committee has passed into the Board of Trade.<sup>2</sup>

<sup>1</sup> 22 Geo. III, c. 82.

<sup>2</sup> See above, part i, p. 205.

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In 1794 a third Secretary of State was appointed, mainly for the purposes of War, but in 1801 he was definitely described as Secretary of State for War and the Colonies. Through him was exercised the royal prerogative in respect of the colonies; and in 1854 he was relieved of his duties in the department of war, in view of the necessity of having a Secretary of State to cope with military issues. The Committee of Trade and Foreign Plantations still exists concealed behind the President of the Board of Trade; and a Secretary of State with a Parliamentary Under Secretary and a large permanent staff now constitutes the Colonial Office.

But the Colonial Office is now responsible for the government of British possessions which are not colonies. Outside the United Kingdom, and apart from the adjacent islands and British India, the dominions and dependencies of the Crown include colonies and protectorates. It is with these two last that we are here concerned.

A *Colony* is defined by the Interpretation Act, 1889, as 'any part of His Majesty's dominions exclusive of the British Islands and of British India'.<sup>1</sup> But by the Statute of Westminster, 1931, the term 'colony' in measures passed after 11 December 1931 does not include the Self-governing Dominions, nor since 1925 has the Colonial Office *eo nomine* been concerned with their government.

'Colony' then is a geographical, not a political term: it does not imply any form of government, nor is it necessarily precisely coextensive with the functions of the Colonial Office. Ascension, for instance, falls under the definition of a colony, but it was long governed by the Admiralty: the protectorates are not a part of the King's dominions, but they are now, with very few exceptions, administered through the Colonial Office.

A *Protectorate* is not defined in the Interpretation Act, but it may fairly be described as a specific area of territory, not within the British dominions, over which the King exercises sovereign rights, mainly based upon the Foreign Jurisdiction Act.<sup>2</sup>

As regards the colonies, certain general principles should

<sup>1</sup> 52 & 53 Vict. c. 63, s. 18.

<sup>2</sup> 53 & 54 Vict. c. 37. As to the nature of a Protectorate, see *post*, pp. 105 ff.

be borne in mind respecting them. The Crown in Parliament can legislate for all and every one of the colonies, while the Crown in Council can also legislate for some. The Crown has a veto on all colonial legislation. The Crown is represented in every colony by an officer at the head of the executive government, usually called *the Governor*,<sup>1</sup> and thus exercises a control varying in extent and character over the composition of the executive in every colony.

The colonies may be divided into two groups: the self-governing colonies, or those which possess responsible government, most of which have now advanced to Dominion status, and the Crown colonies. We may put aside for the present the self-governing colonies.

The forms of government employed for Crown colonies and protectorates are largely the same, and they are dealt with by the same department of the central executive:<sup>2</sup> we may therefore deal with them together.

## § 2. CROWN COLONIES AND PROTECTORATES

### (a) *The Characteristics and Origin of Colonies and Protectorates*

Before touching on these forms of government we should note the distinguishing characteristics of a colony and a protectorate.

First, a colony is British territory, a protectorate is not. Hence it follows (1) that a man born in a British colony is a British citizen; a man born<sup>3</sup> in a protectorate is *prima facie* an alien; (2) Imperial Acts applying either expressly or by necessary implication throughout His Majesty's dominions become binding on any newly acquired territory on annexation.<sup>4</sup>

And, secondly, a colony is only under certain conditions subject to legislation by the Crown in Council. A protectorate is always and necessarily so subject, because the powers possessed in respect of it are based on the Foreign Jurisdic-

<sup>1</sup> Sometimes Governor-General, Commissioner, or High Commissioner.

<sup>2</sup> This general statement needs to be qualified in the case of the Sudan, where the protectorate is under the Foreign Office, and of the Indian (Protected) States, whose relations are with the Secretary of State for India.

<sup>3</sup> For the retention of British Nationality despite birth in a protectorate, see part i, p. 289 *ante*.

<sup>4</sup> This is recognized in the Kenya Annexation Order in Council, 11 June 1920 (S.R. & O., 1920 (No. 2342), ii. 1611).

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tion Act, 1890, which only comes into operation by Order in Council.

The right of the Crown to legislate thus in respect of colonies may originate in various ways.

(1) A colony acquired by conquest or cession is by the common law prerogative of the Crown a subject for legislation by Order in Council.<sup>1</sup> Under such an order the King can constitute the office of Governor by Letters Patent, and by the terms of these Letters, or by Instructions given to the Governor, can provide for the government of the colony. But this power does not exist in case of colonies acquired by settlement; and is lost when once representative institutions have been granted to a colony, unless the right to legislate is expressly reserved in whole or part, as has been done in the case of Ceylon (1931), Southern Rhodesia (1923), and Malta (1921).

(2) The British Settlements Act, 1887, affects all new settlements where there is no existing civilized government, and certain settlements of older date, namely, the Falkland Islands, and the colonies established on the West Coast of Africa.

By this Act Queen Victoria was empowered:

‘To establish such laws and institutions, and to constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts, and for the administration of justice as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty’s subjects and others within any British settlement.’<sup>2</sup>

These powers may be delegated in certain forms and subject to certain restrictions to any three or more persons<sup>3</sup> within the settlement, but the right to legislate by Order in Council is reserved.

(3) Statutes have dealt with the government of individual colonies, but in different ways. The government of the Straits Settlements was separated from that of India by an Act of

<sup>1</sup> *Abeysekera v. Jayatilake*, [1932] A.C. 260; *Campbell v. Hall* (1774), 1 Cowp. 204.

<sup>2</sup> 50 & 51 Vict. c. 54.

<sup>3</sup> The delegation to one person only as in the case of the Ross Dependency Order in Council, 30 July 1923 (S.R. & O., 1923 (No. 974), p. 1712) is probably invalid; Keith, *Responsible Government in the Dominions* (ed. 2), i, p. xviii.

1866,<sup>1</sup> and powers corresponding to those of the British Settlements Act were conferred upon the Crown for the government of the newly constituted colony. St. Helena was transferred from the East India Co. by an Act of 1833.<sup>2</sup> Other colonies possessing constitutions with representative legislatures have by local Acts surrendered these constitutions and requested the Crown to make such provision for their government as might seem desirable. Jamaica, after a negro insurrection, thus acted in 1866.<sup>3</sup>

This surrender has been confirmed by an Imperial Statute and the Crown has thereupon framed constitutions by Letters Patent, reserving the right to legislate further by Order in Council if need be. This was the case with Grenada, St. Vincent, and Tobago in 1876.<sup>4</sup> Tobago some years later was taken out of this group of the Windward Islands and united in government with Trinidad by Orders in Council of 17 November 1888, and 20 October 1898, made under 50 & 51 Vict. c. 44.

(4) Honduras, a colony acquired by settlement, had a representative constitution by usage. By a local Act passed in 1870 it abolished its Legislative Assembly and substituted therefor a legislative Council, nominated by the Crown. This local Act received the assent of the Crown in Council, but no further powers of legislation by Order in Council are accorded to the Crown.

The right of the Crown to legislate by Order in Council for a protectorate rests on the Foreign Jurisdiction Act, 1890,<sup>5</sup> which consolidated previous existing Statutes on the subject. It might, in fact, be said that the protectorate in its most complete form is evolved from a broad construction of the earlier sections of that Act. The Act begins by reciting that 'by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty the Queen has jurisdiction within divers foreign countries', and goes on to enact that the Crown may lawfully:

'Hold, exercise, and enjoy any jurisdiction which Her Majesty

<sup>1</sup> 29 & 30 Vict. c. 125. It is intended to deal in the same way with Aden under the Indian reform scheme of 1935.

<sup>2</sup> 3 & 4 Will. IV, c. 85, s. 112.

<sup>3</sup> 29 & 30 Vict. c. 12.

<sup>4</sup> 39 & 40 Vict. c. 47.

<sup>5</sup> 53 & 54 Vict. c. 37. For the possibility that power to legislate rests in part on the rights of the Crown at common law, see p. 109 *infra*.

now has or may at any time hereafter have within a foreign country, in the same and as ample a manner as if Her Majesty had acquired the jurisdiction by the *conquest or cession of territory*.'

And the second section makes provision for the case of a country not possessing a government from which such jurisdiction could be obtained in any of the methods above recited, enacting that there shall be the same jurisdiction over subjects of the Crown resident in or resorting to that country.

This jurisdiction was originally applicable to cases arising between British subjects, or between British subjects and foreigners, acquiescent in the jurisdiction, in independent States, especially the Ottoman dominions, where jurisdiction had been obtained in the manner recited in the Act; and it was brought into use by Order in Council.

Its extension to protectorates calls attention to the modes in which a protectorate may come into existence.

(1) A protectorate may be constituted by treaty with a foreign power which exercises an independent government. Such a power may place its foreign relations under the control of the British Government and administer its internal affairs under the guidance of a British resident, to the extent provided for in the agreement. This gives rise to the class of protectorates conveniently known as Protected States. The States of the Malay Peninsula and the Sultanate of Brunei are illustrations of this kind of protectorate; so is Zanzibar, and so also is the Kingdom of Tonga.

(2) On the other hand a protectorate may be established over territories owned by a number of tribal chiefs, where civilization, if it can be said to exist at all, is in a backward state, and where land, or the use and occupation of land, or jurisdiction, has been ceded on a large scale to or taken possession of by the Crown, or a company which has been superseded by the Crown, or which continues to govern under the supervision formerly of the Foreign Office,<sup>1</sup> and now of the Colonial Office. Such a protectorate is hardly distinguishable

<sup>1</sup> The Royal Niger Company from 1899 is an instance of a company whose rights and powers have been transferred to the Crown; while the British South Africa Company continued to govern in Rhodesia under conditions laid down in Orders in Council until 1923-4. The British North Borneo Company still rules that area.



from the sovereignty which arises from conquest or settlement. Where a protectorate of this kind is constituted in territory which other European powers have agreed to regard as a British sphere of influence, it would seem impossible for any power to contest the right of the Crown to establish jurisdiction over all persons resident within the protected area. The protectorates throughout South West and East Africa are of this character, and the Orders in Council upon which they rest proceed on a very liberal construction of the Foreign Jurisdiction Act. They empower the High Commissioner or Governor 'by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, good order, and good government of all persons within the limits of this Order'.

Although colony and protectorate differ thus in origin and in character, the same forms of government are used for both; and not only are the same forms used but the same government may include a colony and a protectorate. In the Gambia the same government serves for the colony and the protectorate; in Sierra Leone not only is this so, but part of the colony is administered as part of the protectorate. The same government controls Kenya Colony and protectorate. The colony of Lagos is merged, for purposes of government, in the protectorate of Nigeria. The Western Pacific Commission includes islands which are colonies by cession and by settlement; groups which by convention with Germany have been recognized as under British protection; other groups which we have taken under our protection without reference to other powers; and yet another group, the New Hebrides, in which we exercise a joint control with the Government of the French Republic.

#### *(b) The Forms of Government*

The feature common to all forms of government in use for the Crown colonies and protectorates is the irresponsibility of the executive to a representation, in any form, of the people of the colony.

These forms of constitution range from government by a single executive officer, unassisted even by an official Council, to the combination of an elected representative Assembly

with a nominated Legislative Council, and a Governor, representing the Crown, assisted by an Executive Council—a counterpart, but only in form, of the Constitution of the United Kingdom. The resemblance fails because this Executive Council is not responsible to the representative Assembly: its members are nominated by the Secretary of State at Whitehall, or subject to his approval. If they differ, on matters of policy, with the Assembly, there may be a difficulty about supplies. A deadlock may arise, for which the constitution provides no means of settlement.

This last type of constitution, which now only survives in the Bahamas, Bermuda, and Barbados, was at one time the regular form of colonial government and the only form that the Crown, by the prerogative, could grant to a settled colony. Hence it prevailed in the American colonies, but friction between executive and legislature contributed largely to the American revolution.<sup>1</sup> In the West Indies it still remained the commonest form of colonial government, but gradually decayed and with the emancipation of the slaves became impossible. In the older colonies, where it existed, the possibilities of friction have been removed, either by the grant of responsible government or by the surrender of the original constitution and the acceptance of one which increases the power of the executive, and, in most cases, restores, or in the case of colonies by settlement grants, the right of the Crown to legislate by Order in Council.<sup>2</sup>

The forms of constitution applicable alike to Crown colonies and protectorates fall into definite groups:

A. Some are administered by a Governor or Commissioner without a Legislative Council; and sometimes in subordination to a High Commissioner or to a more fully organized colonial government.

Thus Ashanti, a colony, and the Northern Territories of the Gold Coast, a protectorate, are administered by a Chief

<sup>1</sup> Keith, *Const. Hist. of First British Empire* (1930).

<sup>2</sup> The grant of a representative assembly determines the right of the Crown to legislate by Order in Council; *Campbell v. Hall* (1774), 20 St. Tr. p. 329. The colonies in which this right has not been granted on the surrender and recasting of the constitution are British Honduras and the Leeward Islands.

Commissioner under the Governor of the Gold Coast Colony, who legislates for both territories.

Basutoland, a colony, Bechuanaland, and Swaziland, protectorates, are administered by Resident Commissioners under the High Commissioner for these territories, and the Western Pacific Islands, including the Gilbert and Ellice Islands colony and the Solomon Islands protectorate, by Commissioners under a High Commissioner, who is also Governor of Fiji.

Somaliland is since May 1935 under a Governor; St. Helena has a Governor and an Executive Council; Gibraltar has a Governor, and a Council, but only since 1922.

Three protectorates (the Gambia, Sierra Leone, and Kenya) are administered respectively by the governments of the colonies of the same name. The two former are, in fact, the *winterlands* of their several colonies.

In the Leeward Islands the Governor alone represents the former representative legislature of the Virgin Islands.

B. The next form of colonial government is by a Governor and a Legislative Council, wholly nominated by the Crown. On this Legislative Council are placed the chief executive officers, who constitute a majority of the Council. The Governor initiates all money bills and most of the legislation, and the official majority controls the legislation of the colony: in all cases there is an Executive as well as a Legislative Council. This form of government is used for protectorates as well as for colonies, as may be seen from the following list:

British Honduras.	Nyasaland Protectorate.
Falkland Islands.	Seychelles.
Gambia.	Uganda Protectorate.
Hong Kong. <sup>1</sup>	

The constitutions of all these colonies, save British Honduras, have been framed or approved by the Crown in Council. British Honduras at one time possessed a representative assembly, but altered it to a nominee body by Act of 1870. In the Leeward Islands federation, Antigua, Montserrat, and St. Christopher and Nevis have such island councils.

<sup>1</sup> Hong Kong includes the district of Kowloon, held on lease for a term of 99 years from China, and incorporated in the colony.

C. The next group of colonies possess Legislative Councils, some of whose members are elected; but the constitution is careful to provide that these elected members should be in a minority. These are Fiji, Mauritius, Straits Settlements, Grenada, St. Vincent, St. Lucia, Jamaica, Trinidad, Gold Coast, Sierra Leone (colony and protectorate), Nigeria (colony and protectorate), Kenya, Northern Rhodesia. British Guiana and Cyprus are of unusual character.

The Governor of Fiji is also High Commissioner for the Western Pacific Islands. The Seychelles Islands were at one time administered from Mauritius, and the Turks and Caicos Islands are now subordinate to the Government of Jamaica under an Act of 1873 by agreement of the legislatures;<sup>1</sup> they have a nominated council under Jamaica Law No. 6 of 1926.

This group of colonies furnishes several other instances of the surrender and exchange of representative institutions for the Crown colony form of government. The individual members of the Leeward Islands (federated since 1871 by an Imperial Statute<sup>2</sup>) gave up gradually their old elected assemblies, but are not subject to legislation by the Crown in Council. The federal legislature is in part elected by the non-official members of the island councils, which are nominee bodies, save in the case of Dominica, which has an elected minority.

Jamaica, which enjoyed a full counterpart of British institutions, a Governor, a Privy Council, a nominated Legislative Council, and an elected assembly, gave up this constitution by local Act in 1866,<sup>3</sup> and is now ruled by a Governor, an Executive Council—still called a Privy Council—and a Legislative Council, of whom a minority (fourteen) are elected. If unanimous the elected members can be overridden only by the Governor declaring the issue of paramount importance.

British Guiana and Cyprus possessed Councils in which the elected members were in a majority. In British Guiana the Court of Policy or Legislative Council consisted of the

<sup>1</sup> 36 Vict. c. 6; Order in Council, 4 Aug. 1873.

<sup>2</sup> 34 & 35 Vict. c. 107.

<sup>3</sup> Approved by Imperial Act, 29 & 30 Vict. c. 12; the constitution rests on Orders in Council, 19 May 1884, 3 Oct. 1895, 5 Nov. 1929.

Governor, seven official and eight elected members; but the imposition of taxes, audit of accounts, and discussion of estimates was the work of the Combined Court, which consisted of the Court of Policy and six financial representatives chosen on the same qualifications and under the same franchise as the elected members of the Court of Policy. In 1928,<sup>1</sup> however, in order to secure financial stability the constitution, in substance inherited from the Dutch régime, was replaced by a Council, with ten official and fourteen elected and three nominated members; the Governor in Executive Council may pass measures against the Council.

Cyprus, of which Great Britain enjoyed the use and occupation on certain terms for an undefined period from Turkey, was annexed in 1914 and governed, under the provisions of Orders in Council, by a Governor with an Executive and a Legislative Council: the latter contained nine nominated and sixteen elected members. But as the result of an outbreak of violence the constitution was suspended in November 1931, and legislative power given to the Governor alone.<sup>2</sup>

D. There remains a group of three colonies which retain representative institutions without responsible government. These are Barbados, Bermuda, and the Bahamas. In each of these an attempt is made to bring executive and legislature together by the introduction into the executive of members of the representative Assembly.<sup>3</sup> In each we find a popularly elected Assembly, a nominated Legislative Council, a Governor, and an Executive Council not responsible to the electorate though containing some of its representatives. In the last two colonies it is still possible for private members to propose money votes. In Barbados we get the nearest approach to a Cabinet in the Executive Committee, a body distinct from the nominated Executive Council. This committee contains one member of the Legislative Council

<sup>1</sup> 18 & 19 Geo. V, c. 5; Order in Council, 13 July 1928.

<sup>2</sup> The Colony is treated as ceded or conquered; Letters Patent, 12 Nov. 1931.

<sup>3</sup> In Bermuda three places are reserved for unofficial members on the Executive Council and are filled by three members of the Assembly. In the Bahamas the number is four, one from the Council, three from the Assembly.

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and four members of the Assembly, chosen by the Governor: it prepares estimates, introduces money votes, and has the initiative in legislation as well as in taxation.

These three colonies represent a survival: it seems plain, not merely from the action of the colonies which have surrendered their constitutions, but from the more recent cases of the Transvaal and Orange River Colonies, and of British Guiana, Malta, and Ceylon, that experience approves two types of government and two only, the Crown colony and the self-governing colony.

### § 3. THE SELF-GOVERNING COLONIES

The last group of colonies to be dealt with is that of the self-governing colonies or the colonies which possess responsible government. This means that the colony is administered by men who can command the support of a majority in the colonial legislature, not by men who, as in a Crown colony, are chosen by the Governor, or by the Secretary of State at Whitehall, and hold office irrespectively of the opinions of the representative Assembly, where one exists.

The Executive in such a colony consists of the Governor, nominated by the Crown, and a body of officials nominated not by the Crown but by the Governor: technically holding office at the pleasure of the Governor, as at home the heads of departments hold office at the pleasure of the King; but actually dependent for their continuance in office on the support of a majority in the Colonial Parliament.

There are now, as opposed to the Dominions, which have advanced from the status of self-governing colonies to that of independent units in the British Commonwealth of Nations, and are no longer under the Colonial Office, only three colonies which may be classed as self-governing, Southern Rhodesia, Ceylon, and Malta, and in the last named the system is at present suspended.

#### (1) *Southern Rhodesia*

(1) Southern Rhodesia represents the southern portion of the large areas acquired by the British South African Company, a body chartered in 1889, from the Matabelele King, Lo Bengula, and later conquered by the Company's forces.

Administered under the authority of the Charter and Orders in Council, originally its inhabitants had only a minority of elected representatives on the legislature, but gradually a majority was substituted, with safeguards for the property interests of the Company. After much agitation and after the rejection on a plebiscite in 1922 of an offer of inclusion in the Union of South Africa, a constitution based on responsible government was set up in the following year.<sup>1</sup> There is but one house at present in the legislature of thirty members, and a ministry of six members, headed by a Prime Minister. The powers of the Government are restricted as regards native affairs by the right of control given to the High Commissioner for South Africa, and there were safeguards for the mineral rights of the Company, now acquired by the State, while its railway interests have been safeguarded by the enactment of legislation on the lines of the control of rates by a tribunal analogous to the Railway Rates tribunal created in the United Kingdom in 1921.<sup>2</sup> The High Court is subject to appeal to the Appellate Division of the Supreme Court of the Union of South Africa.<sup>3</sup> A wide power to amend the Constitution is reserved by the Crown.

The affairs of Southern Rhodesia are dealt with by the Dominions Office, which also is concerned with those of Basutoland and the Swaziland and Bechuanaland Protectorates. It is represented locally by an officer, formerly styled High Commissioner for South Africa, renamed in June 1934 High Commissioner for Basutoland, the Bechuanaland Protectorate, and Swaziland. That officer also acts as the representative in the Union of South Africa of the Government of the United Kingdom.<sup>4</sup>

<sup>1</sup> Southern Rhodesia (Annexation) Order in Council, 30 July 1923; Letters Patent, 1 Sept. 1923 (S.R. & O., 1923, pp. 1077, 1078), amended 28 May 1927 (*ibid.*, 1927, p. 1912); 26 Mar. 1930 (*ibid.*, 1930, p. 1989).

<sup>2</sup> 11 & 12 Geo. V, c. 55, ss. 22, 23, 26.

<sup>3</sup> South Africa Act, 1909, s. 103. This arrangement is *prima facie* anomalous since the grant of responsible government, but it is eminently convenient, as Southern Rhodesia has Roman-Dutch law as its common law, and the Appellate Division's authority on this topic stands very high.

<sup>4</sup> The office of High Commissioner for South Africa was originally held by the Governor of the Cape of Good Hope; from 1910 to 1930 it was held by the Governor-General of the Union of South Africa, but the two offices, were separated in view of the decision of the Imperial Conference of 1926, under which the Governor-General ceased to be in any way a representative

(2) *Ceylon*

Ceylon originally had a nominated Legislative Council, then an elected element was introduced, and finally in 1931<sup>1</sup> there was created a form of constitution which is a sort of compromise between Crown colony government and full responsible government. There is a Council of State, of fifty elected members, three officers of State (Chief, Legal, and Financial Secretaries), and eight nominated members. The Council elects seven Committees (Home Affairs, Agriculture and Lands, Local Administration, Health, Labour, Industry and Commerce, Education, and Communications and Works). The head of each Committee elected by secret ballot is styled Minister, and these ministers form the Council of Ministers, who are responsible for the budget and retire on its rejection or on a vote of no confidence. They are aided by the officers of State who control the remaining departments of administration. The Committees thus act as executive bodies, but all actions require if important the Governor's consent, the Governor has wide powers of independent legislation and of administration, and the Crown retains the power to legislate by Order in Council; by a striking innovation it was used in July 1934 to enforce limitation of Japanese imports on the refusal of the ministry to legislate.

(3) *Malta*

Malta, acquired by cession, was long governed under a Crown Colony régime, but in 1921<sup>2</sup> on the analogy of the new Indian Constitution a complex system of Dyarchy was introduced. The field of legislation and administration was mapped out as imperial and local, and for the latter purposes the Governor was to act on the advice of a ministry of seven in accordance with the principles applicable in the United Kingdom. To the Governor in conjunction with a nominated

of the British Government; Keith, *Sovereignty of the British Dominions*, pp. 161, 162. See also p. 360, *post* for the Commission.

<sup>1</sup> Ceylon (State Council) Order in Council, 20 Mar. 1931 (S.R. & O., 1931, p. 1448); Ceylon (State Council Elections) Order in Council, 20 Mar. 1931 (*ibid.*, p. 1482); Letters Patent, 22 Apr. 1931 (*ibid.*, p. 1533).

<sup>2</sup> Letters Patent, 14 Apr. 1921 (as to the Constitution and the Governor) (S.R. & O., 1921, pp. 1464, 1488).



council of officials is assigned power in imperial matters which include public safety, defence, and the general interests of British subjects outside Malta. These matters include merchant shipping, external trade, immigration, aliens and naturalization, and coinage; on these he can himself legislate by Ordinance, while the Crown can by Order in Council regulate these matters; it has also reserved power to amend the constitution as to these reserved matters; the rules affecting language which provide that for elementary education English and Maltese shall alone be used, but permit Italian as the language of the Courts and as an equal language with English at the Universities and Secondary schools; the rule of religious toleration, though the Roman Catholic religion is the official religion; and the reserved civil list which provides for Imperial services and the judiciary. There are a Senate of seventeen members and an Assembly of thirty-two members, with arrangements by joint session for a deadlock. In 1930<sup>1</sup> as a result of clerical intervention in the general election the Constitution was suspended; when restored in 1932<sup>2</sup> the Constitution was modified by insistence on restrictions on use of Italian in elementary schools and the transfer of appointment of judges to the control of the Imperial Government. The Constitution, however, was violated by the Ministry of 1932 and had again to be suspended in 1933, all legislative power being vested locally in the Governor.<sup>3</sup> In 1934 Maltese was made the language of the Courts, with due provision for the use of English and Italian where necessary.

Malta, like Ceylon, is under the Colonial Office. All their external affairs are in the hands of the Imperial Government, and they have no representation save through the Secretary of State for the Colonies at the Imperial Conference. Southern Rhodesia in external affairs is in much the same position, but is allowed virtual representation at the Imperial Conference and was allowed full representation at the Ottawa Conference of 1932. The colony has assumed the titles for its officers, and for its representative in London, usual in the case of

<sup>1</sup> Letters Patent, 26 June 1930 and 9 Aug. 1930; Order in Council, 26 June 1930 (S.R. & O., 1930, pp. 1983 ff.)

<sup>2</sup> 22 & 23 Geo. V, c. 43; Letters Patent, 25 Apr. 1932 (S.R. & O., 1932, p. 1800); Keith, *Journ. Comp. Leg.* xiv. 276.

<sup>3</sup> Keith, *Journ. Comp. Leg.* xvi. 132.

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Dominions;<sup>1</sup> it claims the right to acquire such status, especially if it is allowed to amalgamate with Northern Rhodesia, which is a protectorate under the direct control of the Crown since 1924.<sup>2</sup>

#### § 4. GENERAL PRINCIPLES OF COLONIAL GOVERNMENT

The relations of the colonies to the Crown have been indicated as they came under consideration in respect of the various types of colonial constitution, but they need more consecutive treatment.

The colonies, however complete may be their general measure of self-government, are a part of the British Empire, and are dependent upon the United Kingdom, a fact which distinguishes them from the Dominions, whose status is explained in Sec. iv.

This dependence appears, first, in the control of colonial legislation, which may be exercised either through the Governor of a colony as representing the Crown, or by the Crown in Council. A Bill which has passed the two chambers or chamber of a colonial Legislature must go before the Governor for rejection, reservation, or assent. He may withhold his assent, and the Bill is then lost. He may reserve the Bill for the ascertainment of His Majesty's pleasure, and he may do this either because there is something exceptional in the nature of the Bill, or because it is one of a kind which, by the terms of the colonial constitution or of his Instructions,<sup>3</sup> he is bound to reserve: the Bill in such cases remains inoperative until the pleasure of the Crown is expressed.

He may assent to the Bill, but even then it must be transmitted to the Secretary of State for the Colonies, who may within a period sometimes fixed at two years from its communication advise the King to disallow it. In such cases the King's pleasure is signified to a self-governing colony by Order in Council, to a Crown colony normally by dispatch: but dis-

<sup>1</sup> It styles its members of the Legislature M.P.; *J.P.E.* xiv. 883-5.

<sup>2</sup> Orders in Council, 20 Feb. 1924 (S.R. & O., 1924 (No. 324, 325), pp. 395, 407). The British Government has not yet approved such amalgamation.

<sup>3</sup> If the matters for reservation are only set forth in the Instructions, and the Governor neglects to observe them, and so gives his consent to a Bill which should have been reserved, the law will not on that account be inoperative; Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 4.

allowance is of rare occurrence, and would only take place in the case of a self-governing Colony where Imperial interests are involved.

Besides the universal power of veto upon legislation, the King in Council can legislate for certain colonies, and for all protectorates by Order in Council.

This power is restricted, primarily, in respect of colonies to such as are acquired by conquest or cession; it does not extend to colonies acquired by settlement. The English settler carries with him into the land which becomes British territory by his settlement the law and the liberties of the British citizen. The Imperial Parliament can legislate for him, while the Crown has the right to create a representative constitution by Order in Council or Letters Patent. This rule, however, is applicable only to colonies thus acquired before the British Settlements Act of 1843, which dealt with certain existing colonies<sup>1</sup> and with any which might thereafter be acquired by settlement. For these the Crown may legislate by Order in Council, or may delegate the power of legislation to three or more persons within the colony. Apart from Imperial legislation, or legislation under the above-named Act, the English settler takes with him the law of England as it stood at the date of settlement.

Another restriction on the right of the Crown to legislate by Order in Council is to be found in the rule that, when once a representative legislature is granted to a colony, that colony is subject only to legislation by its own assembly or by the Imperial Parliament, unless the right to legislate is reserved.

Grenada was a ceded colony: the King could make laws and levy taxes. In October, 1763, he issued a proclamation promising to the colony a representative legislative assembly. In April, 1764, he gave a commission to the Governor to summon such an assembly to make laws in the usual forms. In July, 1764, he issued Letters Patent imposing upon Grenada a duty, already imposed on the other Leeward Islands, by consent of their legislatures, of 4½ per cent. on all exported goods in lieu of other customs or import duties.

<sup>1</sup> Now 50 & 51 Vict. c. 54, which deals specifically with the settlements on the West Coast of Africa and the Falkland Islands.

Campbell paid the duty and sued Hall, the collector, for the amount. Lord Mansfield in giving judgment for the plaintiff said:

'We think that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who did or should inhabit or who did or should have property in the island of Grenada—in short to all whom it might concern—that the subordinate legislature over the island should be exercised by the assembly in the same manner as the other provinces under the King.

'And therefore, though the right of the King to have levied taxes was good, and the duty reasonable, equitable and expedient; yet by the inadvertence of the King's servants in the order in which the several instruments passed the office (for the Patent of July, 1764, for raising the impost should have been first) the order is inverted, and the last we think contrary to and a violation of the first, and therefore void.

'How proper soever the thing may be respecting the object of these Letters Patent, it can only now be done by an Act of the assembly of the island or *by the Parliament of Great Britain.*'<sup>1</sup>

And thus we pass from the legislative powers of the Crown in Council to those of the Crown in Parliament. The powers of a Colonial Parliament are limited to its own territory: the Imperial Parliament can legislate for the whole of the King's dominions. But Parliament will not use this power for purposes of taxation,<sup>2</sup> and rarely, and only where Imperial interests are concerned, for legislation which would affect the internal affairs of a colony. The need of Imperial legislation is found more especially in matters where colonial legislation is desired to operate outside the boundaries of the colony, and this can only be effected by the aid of the Imperial Parliament. In respect of matters such as nationality, naval, air and military defence, copyright, merchant shipping, bankruptcy, extradition, crime committed on the high seas, coinage, and the like, Imperial statutes either make provision, or come in aid of the colonial legislature.<sup>3</sup>

<sup>1</sup> *Campbell v. Hall* (1774), 20 St. Tr., p. 329.

<sup>2</sup> The right was renounced for North America and the West Indies by 18 Geo. III, c. 12.

<sup>3</sup> See Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 26–31; Keith, *The Constitutional Law of the British Dominions*, pp. 464 ff.

The supremacy of the Imperial Parliament is indicated in the Colonial Laws Validity Act, 1865, which provides that:

‘Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.’<sup>1</sup>

The Act, while placing on an explicit basis the restrictions on colonial legislative power, abrogated the former rule that colonial laws might be questioned on the ground that they ran counter to the rules of the common law, and thus in effect extended colonial authority.<sup>2</sup>

## § 5. THE COLONIAL GOVERNOR

The Governor of a colony represents the King. His office is constituted and his powers defined by *Letters Patent*; he is appointed by *Commission*; and the manner in which his duties are to be carried out is further set forth in *Instructions*.

His principal executive powers are these:

He convokes and prorogues legislative assemblies, directs the issue of writs for the summons of such as are elected, and dissolves those which are liable to dissolution.

Bills passed by a colonial legislature come before him for assent, veto, or reservation.

In colonies which do not possess responsible government he initiates legislation: in the self-governing colonies a message from him is the foundation of any proposal for a grant of money, and he issues warrants for its expenditure.<sup>3</sup>

<sup>1</sup> 28 & 29 Vict. c. 63.

<sup>2</sup> The issue had been raised with most inconvenient results in South Australia by Boothby, J.; Keith, *Responsible Government*, i. 310, 339 f.

<sup>3</sup> The conflict which arose in Victoria in 1878 between the two Houses led to a difficulty as to the issue of public money without Parliamentary authority, a course pressed upon the Governor, Sir George Bowen, by his ministers, and successfully resisted by him until the two Houses came to a compromise and passed an appropriation Bill; Keith, *Responsible Government in the Dominions*, i. 476 ff.

He exercises the prerogative of pardon, but in a self-governing colony he does so on the advice of his ministers, and only assumes personal responsibility if the matter should affect interests outside the colony and in capital sentences.

In Crown colonies he appoints to vacant offices, absolutely, or provisionally on the approval of the Crown, according to the tenor of his letters patent or instructions, or the terms of local law, and can suspend or dismiss the holders of office subject to regulations, which in the case of higher offices provide for appeal to the Colonial Secretary. In colonies which possess responsible government he can appoint or dismiss all public servants who hold at pleasure, and can appoint to all public offices, but in this he acts with the advice of his Council.

In the self-governing colonies the powers of the Governor are nominally wider than in the Crown colonies, where the duties of the Governor are precisely set forth in his instructions. But within the range of those instructions the Governor of a Crown colony acts with independence. He is given certain limited powers to use at his discretion.

The distinction is to be seen in the relation of the heads of departments to the Governor: in a Crown colony they are responsible to the Governor, in a self-governing colony they are responsible to the electorate. Hence the Governor of a self-governing colony is very much in the position of a constitutional king; his discretion must be that of his responsible advisers; he may endeavour to influence them,<sup>1</sup> but he must not act contrary to their final decision, unless Imperial interests are in issue or unless he is prepared to appeal from them to the colonial Parliament and ultimately to the colonial electorate.

An illustration of this principle was afforded in New Zealand in 1892. A Prime Minister with a large majority in the elected chamber had so few supporters in the nominated second chamber that he not only could not carry his measures, he could hardly obtain a discussion for them. There was no limit to the numbers of the upper chamber, and the Ministry

<sup>1</sup> He has, however, little weight in comparison with the King, as he is without royal prestige and temporary in duration of office, and has little knowledge of local issues.

asked the Governor to create a sufficient number of additional members to give them a majority. The Governor refused to create the full number for which his ministers asked, on the ground that the existing state of parties was abnormal, and that the satisfaction of the demand would permanently alter the political character of the second chamber. On reference to the Colonial Office, however, he was instructed that, where no Imperial interests were concerned, and where there was no reason for doubting that the constituencies were of one mind with his responsible ministers, he must follow their advice.<sup>1</sup> But this rule is subject to the duty of the Governor to obey the law. If a Premier defies it the Governor may properly exercise the power of dismissal, as in the case of New South Wales in 1932.<sup>2</sup>

Such difficulties are perhaps inevitable because our self-governing colonies have come into a heritage of constitutional government which they have not earned. Like the children of a man who has painfully acquired a great fortune, they would spend without self-restraint; they wish to enjoy their liberties and are impatient of conventions.<sup>3</sup> Yet in government, as in daily life, the observance of conventions is apt to smooth the path of every one.

But the Governor is not only a constitutional monarch for the purposes of the colony, he is an officer of the Crown who is bound to consider Imperial interests where these come in conflict, as sometimes happens, with the policy or wishes of his colonial ministers. This may arise in the rejection or reservation of bills, in the exercise of the prerogative of pardon, in the use of the power of dissolution. On such occasions the position of the Governor, involving the discharge of a double duty to the King and to the colony, needs the employment of the utmost discretion.

<sup>1</sup> House of Commons Papers, 198 of 1893, p. 48. Until the end of 1891 members of the Council held their seats for life.

<sup>2</sup> Keith, *The Constitutional Law of the British Dominions*, pp. 158, 159. In emergencies, of course, a Governor may acquiesce in breach of law if assured that Parliament will be asked as early as possible to grant indemnity and that it is most probable that it will do so. But in this case the law broken was that of the Commonwealth which no State legislation could vary, and to which the Governor and his ministers were alike subject.

<sup>3</sup> Cf. the resignation of the Natal Government in 1906; Keith, *Responsible Government in the Dominions*, i. 214-17.

The legal liability of the colonial Governor throws some light on the character of his office.

He can be sued in the Courts of the colony in the ordinary forms of procedure. Whether the cause of action spring from liabilities incurred by him in his private capacity, whether locally or in England, or in his public capacity, he enjoys no *prima facie* immunity. Though he represents the Crown, he has none of the legal irresponsibility of the Sovereign within the compass of his delegated and limited sovereignty.<sup>1</sup>

More important are the questions which arise from time to time as to the limits of his liability, civil or criminal, whether in the colonial Courts or in the Courts of this country, for acts done in his capacity of Governor.

The first question to be answered is whether, apart from his position of Governor, *any* liability has arisen: this of course is a matter of general law, except in so far as the position of Governor may involve greater responsibility, and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence.<sup>2</sup>

But, assuming that a liability has been shown to exist, the next question to be answered is whether the acts complained of were done by the Governor of the colony *as Governor*; this is matter of fact; a further question follows, if so done, were they acts covered by the powers assigned to the Governor. It is not enough that the acts shall be such as the King, through his ministers, might lawfully do; it must be ascertained by reference to the letters patent and instructions with which the Governor of a Crown colony or a self-governing colony is furnished, or to the executive powers conferred by Imperial or colonial law upon the Governor, whether the acts done are justified by the powers conferred.<sup>3</sup> If they are, the Governor is protected; he is a servant of the Crown, doing that which the King might do by his servants, and has commissioned him to do if required. If the acts done are outside

<sup>1</sup> *Hill v. Bigge* (1841), 3 Moore, P.C. 465; *Musgrave v. Pulido* (1879), 5 App. Cas. 102. The colonial Governor differs herein from the Lord-Lieutenant of Ireland, against whom no action could be maintained in Ireland while Viceroy of that kingdom for acts done in his official capacity; *Sullivan v. Spencer* (1872), Irish Rep. 6 C.L. 177.

<sup>2</sup> *Phillips v. Eyre* (1870), L.R. 6 Q.B., pp. 15, 16.

<sup>3</sup> *Cameron v. Kyte* (1835), 3 Knapp 332.



the powers conferred, the fact that the Governor assumed to do them *as Governor* will not protect him from their legal consequences.<sup>1</sup>

We might speculate as to the legal position of the Governor of a self-governing colony, if on the advice of his responsible ministers he gave an order which the law would not support, and was sued by a person injured thereby. He does not seem to possess the legal irresponsibility of the Sovereign. Presumably he would refuse to act on the advice of his ministers unless the action recommended was so obviously desirable, and his ministers so clearly acting with the good will of the community, that they were certain to ensure the passing of an Act of Indemnity.

#### IV. THE DOMINIONS

##### § 1. DOMINION STATUS

The present status of the Dominions is in part the result of the slow evolution of autonomy under responsible government,<sup>2</sup> in part the outcome of the Dominions' participation in the war of 1914-18, of their separate representation at the Peace Conference of 1919, and especially of the grant to them of distinct and independent membership of the League of Nations, followed in 1920 by British recognition of their right to separate representation at Foreign Courts. The status of the Dominions and Great Britain was defined at the Imperial Conference of 1926: 'They are autonomous communities

<sup>1</sup> *Musgrave v. Pulido*, 5 App. Cas. 111. 'Let it be granted that, for acts of power done by a Governor *under and within the limits of his commission*, he is protected, because in doing them he is a servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state.'

It must be understood that 'acts of state' as between sovereign and subject must be acts such as the sovereign can lawfully do. If one should allege of an act complained of, that, though unlawful in itself, it is a matter of State policy or necessity, the answer is, in the words of Lord Camden, that 'the common law does not understand that kind of reasoning'; *Entick v. Carrington* (1765), 19 St. Tr., p. 1030. See pt. i, pp. 319, 320.

<sup>2</sup> Keith, *Responsible Government in the Dominions* (2nd ed., 1928); *The Sovereignty of the British Dominions* (1929).

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within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.' The mode of giving legal effect to this declaration was discussed by an Imperial Conference of legal experts in 1929 and a full Imperial Conference in 1930, and, after formal addresses from all the Dominion Parliaments, the Statute of Westminster, 1931,<sup>1</sup> was enacted. The Union of South Africa has legislatively declared that the status enjoyed is that of a sovereign independent state.<sup>2</sup>

#### (a) *Internal Affairs*

In internal matters the freedom of the Dominions is shown in all vital issues. (1) The Governor-General is appointed by the King on the advice of the Dominion Prime Minister whose counter-signature is added to the Commission under the sign manual, though the Signet of the Secretary of State is affixed also as required by the present Letters Patent constituting the office of Governor-General. It is in the Irish Free State the practice to use in lieu of the Signet of the United Kingdom the Irish seal approved by the King in 1931, and a like practice is proposed for the Union of South Africa,<sup>3</sup> a union signet having been approved in 1934. The power to remove the Governor-General rests with the Ministry on whose advice the King is bound to act; thus Mr. McNeill was removed in 1932 at the desire of Mr. de Valera, though the ground of his offending was his protest at disrespect paid to the representative of the Crown.<sup>4</sup>

<sup>1</sup> 22 Geo. V, c. 4. For a very full account see Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 231-307.

<sup>2</sup> Status of the Union Act, 1934, preamble.

<sup>3</sup> The Union Parliament in Mar.-Apr. 1934 debated three Bills to declare the status of the Union in accordance with the Statute of Westminster, and two of the Bills duly received assent in 1934, the other being held over. These measures add nothing essential but emphasize that all power in the Union in external as well as in internal affairs rests with the King or his representative acting on advice of ministers only. The Royal Executive Functions and Seals Act empowers the Government to substitute the Governor-General for the King in respect of external issues, such as treaties, war or peace or neutrality, or secession.

<sup>4</sup> Keith, *The Constitutional Law of the British Dominions*, p. 160.

(2) The Governor-General represents the King only and is not in any way the agent of the Imperial Government, from which he cannot receive instructions. His relations with his Ministry are parallel to those of the King with his Ministry.

(3) The Crown has now the obligation to act on the advice of the Dominion Ministry as regards assent to Bills, and the British Government cannot now advise the Crown. Therefore, if Bills are still reserved as required in certain cases in the Dominions,<sup>1</sup> assent will be given automatically if desired by the Dominion Government.

These principles apply to all the Dominions; the following do not apply to certain Dominions until by local Act they adopt the Statute of Westminster, viz. the Commonwealth of Australia, New Zealand, and Newfoundland; in none of these cases has this action yet been taken. They are already in force as to Canada, the Union of South Africa, and the Irish Free State.<sup>2</sup>

(4) The Parliaments of the Dominions can legislate with extra-territorial effect to exactly the same extent as the Parliament of the United Kingdom. This removes the distinction asserted in *Macleod's Case*<sup>3</sup> as opposed to that in *Earl Russell's Case*,<sup>4</sup> which denied validity to a colonial act purporting to punish bigamy committed outside the colony, whereas the Imperial Parliament can validly punish bigamy committed in America by a British subject.<sup>5</sup>

(5) The Parliaments can repeal any Act whatever passed by the Imperial Parliament except the Statute of Westminster itself; and the Colonial Laws Validity Act, 1865,

<sup>1</sup> Keith, *The Constitutional Law of the British Dominions*, pp. 19-21. Reservation is abolished for the Union by the Statute of the Union Act, 1934, ss. 8, 10, save as regards a Bill to abolish the Privy Council appeal (9 Ed. VII, c. 9, s. 106). Disallowance of Acts by the King has also been abolished in the Union, but under the terms of the Colonial Stock Act, 1934, the Union is bound not to pass, or, if it passes, on the request of the British Government to amend, legislation inconsistent with the terms on which Union governmental stocks have been admitted to rank as trustee securities in England under the Colonial Stock Act, 1900. In this case other Dominions prefer to permit the right to disallow to remain. In the Irish Free State it has never been in force.

<sup>2</sup> 22 Geo. V, c. 4, s. 10.

<sup>3</sup> [1891] A.C. 455.

<sup>4</sup> [1901] A.C. 446.

<sup>5</sup> Keith, *Responsible Government in the Dominions*, i. 323; 22 Geo. V, c. 4, s. 3. Canada in 1933 gave extra-territorial extension to all Acts hitherto passed implying such operation.

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applies no longer to Dominion Acts, nor to the Acts of the Provinces of Canada; this concession was made to the Provinces to secure their acquiescence in the passing of the Statute.<sup>1</sup>

(6) No Act of Parliament of the United Kingdom passed after 11 December 1931 shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof.<sup>2</sup> In the case of the Commonwealth the request and consent must be that of the Parliament and Government of the Commonwealth, in other cases the Government alone need act.<sup>3</sup> In the Union an Act must, to have any force, be enacted by the Union Parliament.<sup>4</sup>

(7) Even as regards merchant shipping all restrictions on Dominion legislation are swept away, as ss. 735 and 736 of the Merchant Shipping Act, 1894, no longer apply to the Dominions, and it is no longer necessary to secure the approval of the King in Council for new rules of Admiralty courts.<sup>5</sup>

The legislative supremacy of Canada, the Irish Free State, and the Union of South Africa is thus complete, but subject in the case of Canada to the essential restriction that the Dominion and the Provinces alike<sup>6</sup> have no power to alter the British North America Acts, since these define the federal relation which is a pact not to be altered save by general assent, and thus British legislation remains inevitable to alter the constitution.<sup>7</sup> Similarly, if the Statute becomes applicable to the Commonwealth,<sup>8</sup> it will not add to its powers under the constitution nor change the relations of Commonwealth and States. Nor will any change be made as regards the constituent powers of New Zealand,<sup>9</sup> the extent of which is disputed.

(8) It follows from the legislative supremacy of the

<sup>1</sup> 22 Geo. V, c. 4, ss. 2, 7 (2).

<sup>2</sup> 22 Geo. V, c. 4, s. 4.

<sup>3</sup> 22 Geo. V, c. 4, s. 9 (3).

<sup>4</sup> Status of the Union Act, 1934, s. 2.

<sup>5</sup> 22 Geo. V, c. 4, s. 6. Canada has enacted the Admiralty Act, 1934, and the Canada Shipping Act, 1934.

<sup>6</sup> 22 Geo. V, c. 4, s. 7.

<sup>7</sup> Ibid. ss. 8, 9.

<sup>8</sup> Ibid. s. 8.

<sup>9</sup> The Irish Free State now has as its sole legislature the Oireachtas (Art. 12 of Constitution) and the Union of South Africa its Parliament (Status of the Union Act, 1934, s. 2).

Dominions under the Statute of Westminster that they can abolish the appeal to the Privy Council at pleasure. The Irish Free State has acted thus generally,<sup>1</sup> though it has been contended by the British Government that such action is contrary to the treaty of 1921. Canada has abolished appeal in criminal causes, including those arising under provincial Acts imposing penalties, even when these raise constitutional issues of importance.<sup>2</sup> Abolition of the appeal generally is impossible in practice unless and until all the Provinces agree with the Dominion in desiring this result. At present the Privy Council is regarded as the safeguard of minority rights of educational or religious or linguistic character, issues very important in the eyes of French Quebec.

Newfoundland in 1933 owing to extreme financial pressure was compelled as the price of British pecuniary aid to surrender for a time her responsible government,<sup>3</sup> and under an Imperial Act<sup>4</sup> there has been adopted a form of government by the Governor aided by a Commission of six members, three paid by the British Government, three paid by Newfoundland, all selected by the Dominions Secretary. The Governor can overrule in executive matters the Commission, but not on legislative issues. The final responsibility rests with the Dominions Secretary, the Imperial Exchequer having guaranteed a new loan to secure the island from bankruptcy. It is hoped that it may be possible in a few years at most to rehabilitate the finances of the island and restore responsible government.

### (b) *External Affairs*

In external relations there is less clearness of definition. But the essential facts are:<sup>5</sup>

(1) In all League of Nations matters each of the Dominions (except Newfoundland) is quite independent of the United Kingdom. Its representatives at the League Assembly are not accredited by the King on the advice of the Secretary

<sup>1</sup> Act No. 45 of 1933; Keith, *Journ. Comp. Leg.* xvi. 136, 137. The Union of South Africa contemplates such abolition but not at once.

<sup>2</sup> Criminal Code Amendment Act, 1933.

<sup>3</sup> Keith, *Journ. Comp. Leg.* xvi. 25-39.

<sup>4</sup> 24 Geo. V, c. 2.

<sup>5</sup> Keith, *The Sovereignty of the British Dominions* (1929), and *The Constitutional Law of the British Dominions* (1933).

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of State for Foreign Affairs, but by the Governor-General on the advice of his ministers, and they act independently of the British Empire or other Dominion delegates; consultation is, of course, possible but is by no means necessary. Moreover, the Dominions are eligible for seats on the Council, despite the permanent representation thereon of the British Empire in which the Dominions are included. Canada was elected to membership in 1927, then the Irish Free State in 1930, and the Commonwealth in 1933.

(2) The Dominions are in like manner autonomous in relation to the Labour Organization of the League. Further, conventions arrived at under its auspices are ratified by Order of the Governor-General in Council, not by the King, on the advice of the Secretary of State.

(3) The Dominions can be represented at foreign courts and receive foreign ministers when they so desire, provided the foreign State agrees to such action. Thus Canada exchanges representatives with the United States, France, and Japan, the Union of South Africa with the United States, Italy, France, Belgium, Germany, Sweden, Portugal, and the Netherlands,<sup>1</sup> and the Irish Free State with France, Belgium, Germany, the United States, and the Vatican. In all these cases assent for representation is secured through the British Foreign Office. In other cases the Dominions make use, by Imperial permission, of the British diplomatic service, and the consular service, though the Irish Free State and the Union have established a few consulates, in the United States and France and in Mozambique respectively. In the Irish Free State since 27 March 1934 the credentials of the foreign representative, though addressed to the Crown, are presented to the President of the Council.<sup>2</sup>

(4) In all cases of treaties proper concluded by the Dominions, full powers to sign and ratifications are issued by the King. In the case of the Irish Free State these instruments are issued solely on the advice of the Irish ministry under the new Irish seal, and in 1934 the Union adopted a like procedure.<sup>3</sup>

<sup>1</sup> Further extensions are proposed.

<sup>2</sup> The Governor-General has been shorn of all power and of all part in ceremonial, as part of the policy to eliminate the Crown from the constitution.

<sup>3</sup> In the Union the instruments can be issued on the authority of the

In other cases the great seal of the realm is still used, which involves sign manual warrants countersigned by the Foreign Secretary. But he acts merely as the formal agency for the Dominion Ministry, and the real responsibility rests with that Ministry.

(5) The Dominion Governments may conclude agreements informally with foreign governments, without royal intervention of any kind.

(6) It is, however, an obligation laid down by the Imperial Conferences of 1923 and 1926 that every part of the Empire should inform the other parts of its intention to negotiate, so that these parts may decide whether their interests are so much affected as to render them desirous of a joint negotiation or of making representations as to their interests. In any case no part may by treaty impose any active obligation of any sort on another part. Treaties should be signed for all the parts to which they are to apply, and must be ratified on the authority of each part which desires to be bound by the treaty. Where, as in the case of naval disarmament treaties, the whole Empire must be bound as in the conventions arranged at Washington in 1921-2 and the London Conference in 1930, or the Pact of Paris for the Renunciation of War as an instrument of national policy in 1928, the treaty should be signed for all parts and only ratified when all have agreed to do so. It is now the rule to deposit separate ratifications. In certain cases Dominion Governments may be content to use the British delegates, but they sign distinctly for such Dominions and as Dominion delegates.

(7) There are no rules defining the cases in which there must be signature for all parts. The Locarno Pact of 1925 does not bind any Dominion unless its government accepts the obligation, and this no government has consented to do. All the parts of the Empire accepted the obligation to submit certain classes of disputes to the Permanent Court of International Justice in 1929,<sup>1</sup> but the Irish Free State did not accept the restrictions announced by the other parts, and the

Governor-General (Status of the Union Act, s. 4; Royal Executive Functions and Seals Act, s. 6 (1)).

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 410 ff.

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Union of South Africa did not accept in 1931 the General Act for the Pacific Settlement of International Disputes of 1928.

(8) It is uncertain if any Dominion can remain neutral in a war declared by the Crown on the advice of the British Government. So far the right has been asserted only by the Union of South Africa;<sup>1</sup> in the Irish Free State it is admitted that the facilities which under the treaty of 1921 must be accorded to the British Government are incompatible with true neutrality. On the other hand, it is suggested that the common allegiance to the Crown forbids such neutrality in constitutional law, apart from the improbability of an enemy respecting neutrality if any advantage would accrue from neglecting it; but the common allegiance is denied by the Irish Free State.

(c) *The Character of Inter-Imperial Relations*

It is claimed by the Irish Free State that inter-Imperial relations are governed by the rules of international law, the bond of union being merely personal, connexion with the same King, as formerly in the case of the United Kingdom and Hanover. The Free State has, accordingly, claimed that its treaty of 1921 with Great Britain required registration with the League under Art. 18 of the Covenant for its validity, and that inter-Imperial disputes are proper for decision by the Permanent Court of International Justice. The British Government denies both assertions, and it appears that it is supported by the action of the Imperial Conference in 1926, at which the Free State was represented, when it resolved that treaties concluded under League auspices must be assumed, as held by the Legal Committee of the Arms Conference of 1925, not to apply between parts of the Empire. It was then agreed that such treaties should be drawn up as between heads of States to emphasize this aspect of the position, some other form being used when the treaty is intended to operate inter-imperially.

The British view is based on allegiance as a bond excluding

<sup>1</sup> Correspondence between General Hertzog and Dr. Malan (issued 16 Feb. 1934). But the obligations undertaken by the Union Government in 1921 for securing the safety of the British naval base at Simonstown are incompatible with neutrality, Keith, *Journ. Comp. Leg.*, xvi. 291.



such a relation as suggested by the Free State, and it is pointed out that, but for this doctrine, there could be no system of inter-Imperial preferences such as those arranged at Ottawa in 1932, where it was expressly laid down that foreign Powers could not claim the advantage of tariff concessions, made imperially, under the terms of most-favoured nation clauses in treaties.

British nationality still remains a unity for the Dominions except the Irish Free State, and the Imperial Conference of 1930 recommended the maintenance of a common status, while leaving each unit the power of regulating its own nationality or citizenship. The Union of South Africa has also defined nationality and restricted to nationals its franchise and eligibility for office as a member of Parliament; its basis is (1) British nationality, and (2) Union domicile. Canada has defined citizenship for purpose of immigration, and on that definition has based a definition of nationality but has not restricted the franchise to nationals. None of these changes marks so far any great deviation from British nationality as above defined, and allegiance remains a bond of unity in a very real measure<sup>1</sup> except in the Irish Free State. In the view of the Government of the State the connexion between the State and the Crown is not based on allegiance,<sup>2</sup> and under the Irish Nationality and Citizenship Act of 1935 provision is made for the repeal of the statute and common law of British nationality so far as it has been in force in Ireland. That measure extends the definition of citizenship as given in the Constitution, under which the franchise and eligibility for membership of the legislature are confined to citizens. The Act, and a consequential amendment of the Constitution (No. 26), assert for Irish Citizenship international validity.

#### *(d) Imperial Co-operation*

The main work of Imperial co-operation is carried out from day to day by direct communications between the Prime Ministers, the Dominions Office and the Dominion Ministers

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 456 ff.

<sup>2</sup> Mr. de Valera, Free State Senate, 17 Jan. 1935.

of External Affairs, or through the Dominion High Commissioners, all the Dominions being thus represented in London, or the High Commissioners for His Majesty's Government stationed in Canada, the Union of South Africa, and the Commonwealth of Australia.<sup>1</sup> The British Government provides an enormous mass of information to the Dominions especially as regards foreign affairs, a special branch having been instituted for that purpose. But in general foreign affairs the Dominions take little interest; the essential difficulty in Imperial relations depends in fact on the detachment of the Dominions from these European issues in which the United Kingdom is geographically, economically, financially, and strategically, deeply concerned. Their failure to accept obligations under the Locarno Pact is significant of their attitude. On the other hand, Australia and New Zealand demand that Imperial policy shall secure them against danger in the Pacific, and the Japanese alliance<sup>2</sup> was dropped in 1922 partly in order to meet the wishes of these Dominions and of Canada not to maintain a connexion which was represented in the United States as involving potential hostility to that country. Canada, owing to the protection of the Monroe doctrine, follows a policy of isolation in foreign policy, and the Union of South Africa, in reliance on the absence of any foreign menace since the acquisition of South-West Africa, has adopted a like attitude, which may possibly be affected by the revival of German colonial ambitions.

These conflicting views are reflected in the attitude of the Dominions on defence. Canada has no forces, military, naval or air, beyond the minimum necessary for the maintenance of order and the air patrol of the forests to detect forest fires, and must rely for defence on British forces or those of the United States. The Union of South Africa has an effective if small permanent force and a larger trained citizen force, with an air force, fully prepared to suppress any native unrest, the one obvious danger. The Commonwealth of Australia and New Zealand in 1909-10 set up systems of compulsory training of youths, but only for home defence: in 1916-18 New

<sup>1</sup> The post, though established, was not filled by a substantive appointment up to the end of 1934.

<sup>2</sup> Keith, *The Sovereignty of the British Dominions*, pp. 389, 390.

Zealand applied conscription, but it was twice rejected on referenda in the Commonwealth. Since the War both countries have dropped compulsory training on the ground of its unpopularity. The Commonwealth also developed the policy of a separate naval unit in close association with the British Navy, and arrangements to define its legal status were made at the Imperial Conference of 1911.<sup>1</sup> The unit is trained on the lines of the British Navy, and by the loan of men and ships or interchange of vessels is rendered efficient; a small force would otherwise be unable to secure adequate experience. In war as in peace the full control remains with the Commonwealth Government, unless it surrenders it (as in 1914-18) to the Admiralty, or places it temporarily under the command of a British officer.<sup>2</sup> There are arrangements for commissions to be available in either service according to seniority. New Zealand has a like unit, but on war being declared it would automatically have to pass to Admiralty control. Under the treaty of 1921 Irish coast defence was reserved to the United Kingdom in the first place and has not yet been undertaken by the Free State, which maintains a small but well-trained army.

For formal consultations of the whole Empire the Imperial Conference meets from time to time, usually at intervals of about four years, the idea of having annual meetings of an Imperial Cabinet in continuation of the War Cabinet having been dropped. Dominion opinion regarded it as a possible encroachment on autonomy and as involving the danger of Dominion implication in responsibility for British foreign policy. The original plan of the Imperial Conference as fixed in 1906 was thus continued. The Conference is one of the Prime Ministers of the Empire, with such other ministers as they bring to it. Its functions are purely consultative, and its resolutions are usually unanimous. But, despite General Smut's objections in 1923, a resolution may be passed, in the face of dissent, but it has no effect as regards a dissentient. In any case a resolution has no binding force even on an assenting Dominion. It merely binds the Government in

<sup>1</sup> Keith, *Responsible Government in the Dominions*, ii. 1009-12, 1190.

<sup>2</sup> A policy of greater provision for defence, military, air, and naval was intimated in 1934.

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question to carry out the resolution if Parliament will accept it, and it has no effect at all on a new government; this was shown clearly when after the Conference of 1923 Mr. Baldwin, having promised there to secure certain preferences for Dominion exports, appealed to the electorate for authority to impose certain taxation and was defeated. The Labour Ministry which took office allowed the project to go before the House of Commons where it was defeated, the Ministry opposing it by vote. The Conference in 1926 and 1930 defined, as shown above, Imperial relations, and in 1932 an Economic Conference was held at Ottawa. In 1935 it was found impracticable to hold a Conference; discussions being held in lieu with Dominion Ministers invited to London to take part in the celebration of the 25th anniversary of the King's accession to the throne.

The United Kingdom has co-operated under the Empire Settlement Act, 1922,<sup>1</sup> in Dominion settlement by grants of aid to emigrants and loans at low rates of interest for Dominion development. These agreements have not been wholly successful; in 1933 Victoria had to meet in some small degree claims by immigrants by a grant of £100,000, a Royal Commission having reported that the State had failed in its obligations.<sup>2</sup>

#### (e) *Inter-Imperial Disputes*

No tribunal has been erected to settle controversies within the Empire. The Conference of 1930<sup>3</sup> suggested that such issues should be referred to an inter-Imperial tribunal set up *ad hoc*, on the basis that each party chose two members of the tribunal, one a jurist of distinction from a part of the Empire not involved in the dispute, and one without limitation save of selection from the Empire; these four were to select a fifth. It was then impossible to secure agreement on compulsory reference to disputes, and the proposal of the British Government in 1932-4 to refer to such a tribunal the issue of the

<sup>1</sup> 12 & 13 Geo. V, c. 13.

<sup>2</sup> In 1934 the British Government provided £18,000 for the further relief of the much wronged settlers, many of whom returned to England without funds. See J. H. Thomas, *Commons Debates*, 14 Nov. 1933.

<sup>3</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. xxxii f., xxxix f., 217-19, 299, 300.

Irish land annuities was rejected by the Irish Free State, which demanded the right to have a foreigner on the tribunal. This view, of course, was counter to the British doctrine of the impropriety of foreign concern with inter-Imperial issues, and therefore a deadlock was reached.

The right to secede was incidentally claimed by the Irish Free State during the discussions, but the British Government, when asked to undertake that, if secession were attempted, no hostile measures would be taken against the Free State, declined to say what measures they would adopt if a Republic were declared.<sup>1</sup> On the other hand, General Hertzog in his agreement with Dr. Malan, leader of the Cape Nationalists, in February 1934 reiterated his claim of the divisibility of the Crown, and of the right of the Union to be (1) neutral in British wars, and (2) to secede at pleasure from the Empire. He also accepted the right of the party to work for republicanism and undertook to remove from the constitution all elements inconsistent with sovereign independence. As seen above, the measures to define the status of the Union and to regulate royal executive functions and seals fully supply the legal authority so far as the Union is concerned to make good his assertions. General Hertzog has at the same time made it clear that in his opinion the complete sovereignty of the Union affords the essential basis for co-operation within the Commonwealth.

## § 2. THE DOMINION CONSTITUTIONS

The self-governing Dominions are Canada, Newfoundland,<sup>2</sup> the Commonwealth of Australia (including the States of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia), the Union of South Africa, and the Irish Free State. Of these the two great Federations, the Dominion of Canada and the Commonwealth of Australia, will need separate consideration.

It must not be supposed that responsible government, as we understand it, sprang into existence, fully developed, in

<sup>1</sup> See Lord Lucan's statement, House of Lords, 20 Dec. 1934, supplementing the Secretary of State's dispatch, 5 Dec. 1933.

<sup>2</sup> Its status at present is in abeyance; see p. 87 *ante*.

the colonies, any more than it did at home. Canada is the birthplace of colonial responsible government, and there we can trace the growth of its principal features: (1) the acceptance by the Governor of the advice of his responsible ministers; (2) the presence of those ministers in one or other house of the Legislature; (3) their dependence upon a Parliamentary majority for their continuance in office; (4) the solidarity of the Cabinet under the Prime Minister; (5) the permanent tenure of office by the civil servant, and his exclusion from the Legislature. These principles developed in Canada between the years 1840-50, notably during the time that Earl Grey was Colonial Secretary,<sup>1</sup> and to him much more credit is due than is usually accorded.

Statutory provision for these essential features, where it exists at all, is not easily found; in Canada it was introduced without change in law. In a clause in the Act of the Victorian Parliament which formulated the existing constitution we find one such feature.

‘§ 37. The appointments to public offices under the Government of Victoria, hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor, with the advice of the Executive Council, *with the exception of the officers liable to retire from office on political grounds*, which appointments shall be vested in the Governor alone.’<sup>2</sup>

The introduction into the Victorian Statute of a rule which is merely a convention of the English Constitution is of itself a curious illustration of the way in which custom crystallizes into law. But it must be confessed that to one who did not know the custom the words would be obscure. An officer liable to retire ‘on political grounds’ is a departmental chief or member of the Cabinet who goes out of office when his party has ceased to be in a majority in the elected legislature. The Act which made ministers in Cape Colony responsible to its Parliament recites as its object ‘the introduction of the system of executive administration commonly called respon-

<sup>1</sup> Keith, *Responsible Government in the Dominions*, Pt. I, ch. i. Due recognition of Robert Baldwin’s part in the attainment of responsible government is found in Wilson’s *Life* (1933), pp. 50 ff., 71 ff., 138 ff.

<sup>2</sup> The Act is in the Schedule of 18 & 19 Vict. c. 55.

sible government'.<sup>1</sup> But nothing in the Act explains the phrase.

The convention, based on necessary convenience, which requires ministers to occupy seats in one or other house of the Legislature finds statutory expression in several of the existing constitutions. In Victoria half of the ministry must be in Parliament. In Western Australia one of the seven holders of the executive offices *liable to be vacated on political grounds* must be a member of the Legislative Council. In the Union of South Africa<sup>2</sup> and in the Commonwealth of Australia<sup>3</sup> ministers must possess, or within a limited time obtain, seats in one or other chamber on pain of losing office. In South Australia we find that a minister may be liable to loss of office if *unable to become a member, or to obtain the support of a majority*<sup>4</sup> of the Parliament.

In the Irish Free State the Constitution is marked by the effort to enact responsible government as an essential part of the law. Accordingly the President of the Council, who is the Prime Minister, is elected by the lower house (Dáil Eireann), and then selects his colleagues, who must be approved by the Lower House.<sup>5</sup> Members of the Executive Council, i.e. the Cabinet, must be members of the Dáil, or in one case only of the Senate.<sup>6</sup> The Governor-General, who is a nominee of the party in power, has no independent authority of action, and no provision is made for his dismissing ministers. On the other hand, the sovereignty of the Dáil is carried to the extent that the Governor-General is not permitted<sup>7</sup> to dissolve the legislature on the advice of a ministry which has ceased to command a majority in the Dáil. Moreover, by a recent alteration of the Constitution<sup>8</sup> the power to reserve legislation has been taken away, and the present Governor-General

<sup>1</sup> Cape of Good Hope Statutes, No. 1 of 1872, vol. ii, p. 1191.

<sup>2</sup> 9 Ed. VII, c. 9, s. 14.

<sup>3</sup> Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12, Const. s. 64: 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.'

<sup>4</sup> South Australia Statutes, No. 2 of 1855-6, s. 39.

<sup>5</sup> Arts. 52, 53.

<sup>6</sup> Art. 52; Act No. 9 of 1929. This body is to be abolished in 1935, when the Act for this purpose will take effect.

<sup>7</sup> Art. 53.

<sup>8</sup> Act No. 41 of 1933.

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takes no part in official functions, the Vice-Regal Lodge having been converted into a museum. The constitution thus is virtually republican so far as the position of the Governor-General is concerned. An experiment was made in the first few years of the Constitution in the appointment of 'extern' ministers who were not in the Cabinet nor collectively responsible for finance of policy, but held office independently of the Executive Council, being solely responsible to the Dáil for the administration of the departments in their charge. This arrangement proved unsatisfactory, since the consideration of finance enters so vitally into all administration as to render the attempt to divide responsibility impracticable, and it is now the practice to select all ministers to be members of the Executive Council.

The Free State Constitution is also marked by the fact that it contains a list of rights of the subject,<sup>1</sup> which, however, have habitually been overridden by drastic legislation for public safety, and in 1931 by a constitutional amendment<sup>2</sup> of a remarkable character providing for the creation of military courts to deal with a wide range of offences and having powers to increase the penalties provided by law. It further contains the principle that all authority is derived from the people<sup>3</sup> and that the assent of Parliament is necessary before the State can be involved in war, except in the case of defence against attack.

Apart from the Irish Free State the system of responsible government is essentially conventional. With the doctrine asserted by the Imperial Conferences of 1926 and 1930 that the Governor-General is the representative of the Crown only, there is a tendency to closer following of British usage in the matter of the grant or refusal of a dissolution, which under the older practice was largely in the discretion of the Governor-General, who might refuse a dissolution if he could find a ministry to accept *ex post facto* responsibility for his action, as was often possible. A severe blow, however, to this practice was struck in 1926 when Lord Byng refused Mr. Mackenzie King a dissolution,<sup>4</sup> and in lieu on his resignation

<sup>1</sup> Arts. 6-10.

<sup>2</sup> Act No. 37 of 1931.

<sup>3</sup> Art. 2.

<sup>4</sup> Keith, *Speeches and Documents on the British Dominions, 1918-31*, pp. 149-60.



appointed Mr. Meighen Prime Minister, for the latter was decisively defeated at the general election which was rendered necessary by his inability to secure a majority in the House of Commons. This precedent was expressly relied on in 1931 by the Governor-General of the Commonwealth in according a dissolution under circumstances in which under the older practice it might well have been refused.

The basis of the Dominion Constitutions is in other matters statutory, and in all cases save that of the Irish Free State the Statute is Imperial, but has been largely modified by local legislation in accordance with its terms. The case of the Irish Free State is peculiar; the Constitution was framed as contemplated by the Treaty of 1921 by a Constituent Assembly which enacted it, and it was also enacted by the Imperial Parliament. In the Free State its validity was held to rest on the Irish Act, in the United Kingdom the Imperial Act was regarded as paramount. But power to alter the latter was conferred by the Statute of Westminster, 1931, and the Constitution therefore rests essentially on the Irish Act of 1922. In the Union of South Africa it is proposed to re-enact the South Africa Act, 1909, as a Union Act. Newfoundland, whose Dominion status is at present in abeyance, has Letters Patent at the basis of the Constitution supplemented by local acts.

We have already noted the main points of this form of government. The Governor-General summons, prorogues, and dissolves the legislature, acting on the advice of his ministers; on like advice he exercises under delegation from the Crown the prerogative of pardon; where the second chamber is nominated in whole or part, as in Canada, New Zealand, and the Union of South Africa, and not elective, he summons to the Senate or Legislative Council such persons as his ministers think fit; his assent to Bills is necessary to their validity, but in all respects he acts, and is supposed to act, since the Imperial Conference of 1926, like the sovereign of these realms, on the advice of his ministers.

His office is constituted and defined by Letters Patent; he acts under a Commission, and subject to Instructions which further define his powers. These are all now issued at the request of the Dominion Government.

The Executive (in Canada Privy) Council is in most cases coextensive with a group of departmental chiefs changing with the rise and fall of party majorities. Sometimes, as in the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, Tasmania, and Victoria, the cabinet or group of departmental chiefs on leaving office remain members of the Executive Council, but are not summoned to meetings. There is, however, no real parallel to the Privy Council.

The Legislative Council or Senate<sup>1</sup> consists of persons nominated by the Governor in three of the self-governing Dominions—Canada, Newfoundland, New Zealand, and in the Union of South Africa, a fifth of the Senate is nominated. In the rest, including the Commonwealth of Australia, the Legislative Council or Senate is elected, but on different conditions, either of franchise or tenure, from that of the other House.

The Lower House<sup>2</sup> in a self-governing territory is usually chosen on adult franchise.<sup>3</sup> Its natural term of existence is uniformly shorter than that of the Legislative Council, where the latter is subject to dissolution, varying from three years<sup>4</sup> in Australia to five years. Payment of members is almost universal. Two conventions of the Imperial Parliament are embodied in Statute, or observed in practice. The rule that money bills must originate in a recommendation from the representative of the Crown is based on Statute and not on standing order or convention; and in some form or other the initiative and control of the Lower House over such Bills is established.

<sup>1</sup> In Queensland the Council, originally nominated, was abolished in 1921. In Canada only Quebec now has a second chamber, nominated. Those of Nova Scotia, New Brunswick, Manitoba, have been abolished outright; that of Prince Edward Island is merged in the Assembly.

<sup>2</sup> The title of the Lower House in the various colonies is worth noticing. In the Dominion of Canada it is the House of Commons; in the Commonwealth of Australia and the Dominion of New Zealand it is the House of Representatives; in the Union of South Africa, Newfoundland, South Australia, and Tasmania, the House of Assembly; elsewhere the Legislative Assembly, in the Irish Free State Dáil Éireann.

<sup>3</sup> The franchise is still denied to women in Quebec for provincial elections as opposed to federal.

<sup>4</sup> The term was increased to five years in South Australia for the existing legislature in 1933. In New Zealand it is now four years.

It remains to consider the two great Federations of self-governing colonies, the Dominion of Canada and the Commonwealth of Australia.

The federation of the Canadian colonies is provided for under the British North America Act of 1867. The Australian Commonwealth Constitution Act of 1900 contains the terms of Australian federal government.

The history of the movement towards federation would not be in place here. It is enough to say that the British North America Act provided for the immediate federation of Canada, Nova Scotia, and New Brunswick, for the division of Canada into the two provinces of Ontario and Quebec, and for the admission of the rest of British North America into the scheme of Federal Government. Under this Act Manitoba was introduced in 1870, when the North-West Territories were acquired from the Hudson's Bay Company, British Columbia joined in 1871, Prince Edward Island in 1873, and the new provinces of Alberta and Saskatchewan were created out of the North-West Territories in 1905. The residue of those territories constitutes the Yukon administered by a Commissioner with an elected Council for legislation, and the North-West Territories administered by a Commissioner with a nominated Council.

In Australia the entire group of self-governing colonies came at once into the federal system, but the isolation of Australia in respect of other countries and the complete development of responsible government in all the federating colonies have brought about some contrasts which it is proper to note.

In each we have a Governor-General, representing the Crown in the Federal Government, and Lieutenant-Governors or Governors of the Provinces or States which form the federation. In each we have a central legislature, and provincial or state legislatures. In each we have a supreme or high court capable of determining questions which may arise between the central or Federal Government and Parliament, and the Governments or Parliaments of the units which constitute the Federation.

But the two constitutions differ in some conspicuous features. The Provinces of the Canadian Federation are much

more intimately connected with the central Federal Government than are the States in the Australian Commonwealth, and for this reason. The States were self-governing colonies and very reluctantly joined federation, retaining as much power as possible. Some of the Provinces sacrificed many of the rights of a self-governing colony for the sake of a more intimate union; others were created by the federation. This difference appears in various ways.

The Senate of the Dominion, 96 in number, is nominated by the Governor-General, and its members hold their seats for life. The Australian Senate is elected, six members from each State, for a term of six years, half retiring every three years. The Canadian Senate is also constituted so as to secure a representation of each province, but whereas in Australia each State sends the same number of representatives to the Senate, in Canada the amount of representation is now based on assigning equal representation to the four great divisions of the country (Ontario, 24; Quebec, 24; Nova Scotia, 10, New Brunswick, 10, and Prince Edward Island, 4; Manitoba, 6, British Columbia, 6, Saskatchewan, 6, and Alberta, 6).

Again, the Lieutenant-Governors of the Canadian Provinces are appointed and can be dismissed by the Governor-General in Council; the Governors of the Australian States are appointed by the Crown on the advice of the Secretary of State.

The legislation of the Canadian Provinces is subject to disallowance by the Governor-General in Council.<sup>1</sup> But this power is now very rarely used in respect of Acts to whose substance exception is taken; and it is the rule to allow Acts whose legal validity is doubtful, to stand, leaving the matter to come before the Courts and so, ultimately, before the Judicial Committee of the Privy Council.

The legislation of an Australian State does not come before the Government of the Commonwealth; if affirmed or reserved by the Governor of the State it passes at once to the Dominions Office for the consideration of the Secretary of State, and no Act has been disallowed at the request of the federation.

<sup>1</sup> See 30 & 31 Vict. c. 3, ss. 55, 56, 57, 90, and Keith, *Responsible Government in the Dominions*, i. 560-9.

And this points to a very marked difference between the legislative powers of the Australian States and the Canadian Provinces, and of their Federal Legislatures.

The Parliaments of the Australian States have unrestricted powers of legislation, save only as regards customs and excise, defence, posts, telegraphs, and telephones, quarantine, light-houses, &c.; the Commonwealth Parliament is confined to certain subjects which concern the Commonwealth as a whole;<sup>1</sup> but, if a State Parliament should legislate on a subject assigned to the Commonwealth Parliament, and should legislate in a sense repugnant to that of the Federal Legislature, the latter would prevail.<sup>2</sup>

In Canada certain subjects are assigned to the Dominion Parliament and certain other subjects to the Parliaments of the Provinces,<sup>3</sup> and the legislative powers thus concerned are mutually exclusive. Certain subjects occupy an intermediate ground and are common to both,<sup>4</sup> certain matters can be legislated for by federation or province according to the aspect of the question, but in case of a conflict of law the Dominion Statute prevails.

The local and domestic character of the subjects assigned to the provincial legislatures may explain the abolition of the second chamber in all but one of the Provinces.

In the operation of the Constitutions as interpreted by the Privy Council in the case of Canada, and the High Court in the case of the Commonwealth, many unexpected results have been achieved. On the whole the authority of the federation in Canada has proved much less than was intended to be the case by the framers of the Constitution, the Privy Council having asserted on many occasions the sovereign position within their spheres of the Provinces. In the Commonwealth, on the other hand, since 1920 the High Court has tended largely to extend the ambit of Commonwealth power.<sup>5</sup> Moreover, in its operation the financial agreement between States and Commonwealth of 1927 and the alteration of the Constitution which gave it effect have provided the Common-

<sup>1</sup> 63 & 64 Vict. c. 12, Const. ss. 51, 52.

<sup>2</sup> 63 & 64 Vict. c. 12, Const. s. 109.

<sup>3</sup> 30 & 31 Vict. c. 3, ss. 91, 92.

<sup>4</sup> *Ibid.* s. 95.

<sup>5</sup> Keith, *The Constitutional Law of the Dominions*, pp. 341 ff.

wealth with powers to legislate to compel recalcitrant States to implement their obligations as to the payment of interest on the debts for which the Commonwealth has accepted responsibility to the lenders. On the other hand, the development of treaty making by Canada has resulted in the Privy Council recognizing in the Dominion the power to make treaties and then to legislate even so as to override the Provinces in order to give them effect, for example, in the matter of aeronautics<sup>1</sup> and radiotelegraphy.<sup>2</sup>

Both constitutions are rigid, but that of Canada is much the more so, since all questions affecting distribution of power between the Provinces and the Federation fall outside the power of either party, and the only method of alteration is by action of the Imperial Parliament. It is still disputed whether in such cases that Parliament will act only on proof of unanimity between the Federation and the Provinces, as has been claimed by Ontario and Quebec, at various times. No solution of this impasse has yet been reached. In the Commonwealth the power of change is drastically reduced by requiring a referendum, on which any change must receive not merely a majority of votes but also of States. Hence few alterations of importance have been effected.

There exists no effective provision to end deadlocks between the Houses in Canada, whereas an elaborate process by double dissolution is provided in the Commonwealth. The latter, however, has proved too cumbrous for practical effect.

Neither Constitution contains any provision for the secession of any member, and in 1868 the British Government and Parliament refused to relieve Nova Scotia from her connexion with the Dominion. In 1934 the Parliament of Western Australia petitioned the Crown and both Houses of Parliament to legislate to release the State from membership of the Commonwealth, but the Commonwealth Government pointed out that such action would be wholly unconstitutional.

The Union of South Africa was achieved in 1909 by the passing of the South Africa Act, under which the four colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (whose name under Union was altered to Orange Free State) formed a legislative union.<sup>3</sup>

<sup>1</sup> [1933] A.C. 54.

<sup>2</sup> [1933] A.C. 304.

<sup>3</sup> Keith, *op. cit.*, pp. 363 ff.

The provinces were accorded, as a concession to the federal preferences of Natal and of a section of Cape opinion, powers which make them more than local government bodies but a good deal less than provinces in the ordinary sense. The legislation of the Union is paramount, and it has been proposed to abolish the provinces as needlessly elaborate machinery of government. On the other hand, Natal has urged that they be given federal position, or that secession be permitted, and the policy of the present day is to permit their continuance in much the same form.<sup>1</sup> Their chief work is education and minor local government, and they derive most of their revenue from Union subsidies. All judicial matters are in the hands of the Union, and legislation needs Union assent.

## V. MISCELLANEOUS POSSESSIONS, DEPENDENCIES, AND PROTECTORATES

### § 1. MISCELLANEOUS POSSESSIONS

Under this heading must be placed some possessions of the Crown which do not fall into either of the preceding sections. The Peninsula of Aden and the Island of Perim, adjacent to it at the mouth of the Red Sea, were formerly governed from Bombay, and later by a Chief Commissioner under the Government of India, as a part of British India. So too was the Island of Socotra, about 300 miles to the south-east of Aden. But the adjoining protectorate of Aden concerned interests of the Colonial Office and the Air Ministry; the political relations of the whole area were placed under direct Imperial control, and the transfer of Aden to colonial status is provided for in the Government of India Bill of 1935. The Island of Ascension in the South Atlantic, with a population of about 188, used to be under the supervision of the Lords of the Admiralty, but it has now been made a dependency of St. Helena.<sup>2</sup> There are a good many unadministered islands in the Atlantic and Pacific. The most interesting is the

<sup>1</sup> It is provided in the South Africa Act (Amendment) Act, 1934, that no province shall be abolished, have its powers abridged, or its boundaries altered except on the petition of the Provincial Council. This rule, however, has no binding effect, but serves as a declaration of principle.

<sup>2</sup> Letters Patent, 12 Sept. 1922.

little settlement of Tristan d'Acunha, with its population of 160, where the inhabitants practically enjoy their goods in common, and there is no strong drink on the island and no crime. Some small islands in the Indian Ocean, the Basses and Minicoy, and the Island of Sombbrero (now included in the Leeward Islands) in the West Indies, are used for light-houses maintained by the Board of Trade;<sup>1</sup> others in the Pacific are leased by the High Commissioner for the Western Pacific after consultation with the Treasury.

## § 2. PROTECTED STATES, PROTECTORATES, AND SPHERES OF INFLUENCE

These relations differ in character: the dependent or protected states may stand in varying degrees of dependence upon the government of this country.

But a sphere of influence should at once be distinguished from a protectorate; for the recognition of an area as a sphere of British influence brings the government of this country into no necessary relations with the dwellers on this area: it means no more than this—that other countries have by treaty with the Crown undertaken not to interfere either by acquisitions of territory, creation of protectorates, or imposition of treaty obligations with any influence which the King may be advised to exercise within this area.<sup>2</sup> Thus Russia and the United Kingdom marked out spheres in Persia in 1907. Spheres of influence are now largely superseded by the definite allocation of sovereignty in Africa, and the renaissance of Persian independence. But the Persian Gulf is under British influence, and Japan has interests in China.

It would seem to be an essential feature of a protectorate that the foreign relations of the protected state should be under the control of the protecting state; the usual form in which such relations arise in international law is by treaty between these two states, or between the protecting state and other states. In either case, the return for protection would

<sup>1</sup> Dues are collected under Imperial legislation at ports of call.

<sup>2</sup> e.g. the Anglo-German agreement of 1890, Art. 7. This was followed by an Order in Council, 9 May 1891, placing the British sphere under the control of the High Commissioner for South Africa.



be a subordination of the protected to the protector in all dealings with outside powers.

It would naturally follow that if we interpose between the protected state and foreign powers we make ourselves responsible for the security of the subjects of those powers while under the jurisdiction of the protected state. The control of foreign relations therefore necessarily carries with it some rights and duties respecting the internal affairs of the state so controlled, and this leads to difficult questions, some of international, some of municipal law.

The protectorates with which we are concerned may be divided into those in which there is, and those in which there is not a settled government. The Indian protected states stand apart. The King is Emperor of India, the rulers of the native states owe political allegiance to him, and, though their territories are not British territory, they are for international purposes included in the Indian Empire, and stand in a relation to this country very different to that of the African protectorates where no settled form of government existed, or to states, territorially separate, with definite international relations.<sup>1</sup>

(1) The Protectorates or Protected States, in which a settled form of government exists—Zanzibar, Tonga, Brunei, North Borneo, Sarawak, and the Malay States<sup>2</sup>—possess these features in common, that the British Government by treaty exercises a control over their foreign relations, and in the first three cases<sup>3</sup> a jurisdiction over British subjects within their territories. The Malay States are practically controlled in their internal affairs by the advice of a British Resident, a phenomenon formerly exhibited on a larger scale in the case of Egypt. In these cases it is not considered necessary

<sup>1</sup> Ilbert, *Government of India* (3rd ed.) p. 422; Hall, *Foreign Jurisdiction of the British Crown*, p. 206.

<sup>2</sup> There is a federation of Perak, Selangor, Negri Sembilan and Pahang, with a federal legislature beside the State Councils, and the unfederated States, Johore, Kedah, Perlis, Kelantan, and Trengganu, the last four acquired from Siam in 1909.

<sup>3</sup> The fact that in the other Protected States jurisdiction is not asserted necessitated the passing of 17 & 18 Geo. V, c. 43 to allow of the recognition of probates granted in such territories. Since 1908 consular jurisdiction is not exercised in Brunei, powers having been given to the Resident by a local law.

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to exercise jurisdiction. North Borneo and Sarawak are curious examples of independent sovereignty exercised by British subjects under the protection of the Crown under treaties of 1888, but not within the dominions of the Crown. In Sarawak foreign relations are controlled and questions of succession determined by the British Government, which also in the case of North Borneo approves the Governor appointed by the Chartered Company. Zanzibar is governed by a Sultan advised by a British Resident, and has Executive and Legislative Councils; natives fall under the Sultan's Court, Europeans under the Resident's Court. Tonga, a constitutional monarchy, has in minor matters jurisdiction over Europeans.

(2) There remain the Protectorate in the Pacific Islands, and the group of Protectorates in Africa. The rights exercised by the Crown in these places, where no settled government exists, have developed in accordance with the gradually extended construction of the Act of the Berlin Conference of 1885. This Act was designed to meet the creation of protectorates, by the signatory powers, on the African coast, and to ensure securities for law and order to the subjects of states travelling or resident therein.

The rights assumed by the Crown under the Berlin Act were based at first on a strict construction of the Foreign Jurisdiction Act, which enables the Crown to exercise jurisdiction, acquired in certain ways, in foreign countries, over its own subjects and those of consenting powers, and in uncivilized countries over its own subjects.<sup>1</sup> France and Germany, from the first, construed their powers under the Berlin Act more widely, and as conferring jurisdiction over the subjects of other countries than their own.

The Orders in Council made for these regions of the Empire down to the year 1891 show an evident desire to mark a distinction between the rights conferred by a protectorate and those of territorial sovereignty. Thus the Africa Order in Council of 1889<sup>2</sup> assumed jurisdiction, within the protectorates to which it referred, over British subjects and foreigners who assented, or whose governments had assented, to the

<sup>1</sup> 53 & 54 Vict. c. 37, ss. 1, 2.

<sup>2</sup> S.R. & O. Rev., 1904, vol. iii, p. 259.

exercise of this jurisdiction. But the Africa Order of 1892<sup>1</sup> extended this jurisdiction to the subjects of the signatory powers without the express consent of their governments, and the Order in Council of 9 May 1891,<sup>2</sup> constituting the Protectorate of Bechuanaland assumes a general jurisdiction over all persons within the area concerned. From this time forward Orders in Council relating to the South African protectorates have followed the lines of the Bechuanaland Order.<sup>3</sup> Similar provision has also been made for the protectorates in East and West Africa.

It is to be observed that these Orders are made under powers vested in His Majesty 'by virtue of the Foreign Jurisdiction Act or otherwise', and it may be in virtue of the common law prerogative, applied to a protectorate as though it were ceded territory, for the government of which some provision must be made, that the Orders entrust the representative of the Crown with the very wide powers conferred upon him.

These powers include the provision, by Proclamation, for the peace, order, and good government of all persons within the limits of the Order, 'including the prohibition and punishment of all acts tending to disturb the public peace'. The Crown can, under these orders, acquire land through its representatives, and, where conceptions of ownership in land are vague, or where there are large tracts unoccupied or waste, can exercise a general control over the dealings with the waste.<sup>4</sup> It can legislate to effect a delimitation of native and European land holdings as in Swaziland,<sup>5</sup> or legalize detention of a difficult chief.<sup>6</sup> The rights exercised over these protectorates may be said to differ from territorial sovereignty in little but name.

<sup>1</sup> S.R. & O., 1892, p. 486.

<sup>2</sup> S.R. & O., 1891, p. 295. This Order was framed in the Colonial Office, which took a bolder line on this question than the Foreign Office, under which, at this time, several of the African Protectorates were administered.

<sup>3</sup> A similar change is observable in the earlier Orders in Council relating to the Western Pacific and the Pacific Order in Council of 1893.

<sup>4</sup> As in East Africa and Uganda, S.R. & O., 1898, pp. 381, 382. Cf. for waste lands, *Southern Rhodesia, In re*, [1919] A.C. 211 which assigned to the Crown all ungranted lands in the protectorate.

<sup>5</sup> *Sobhuza II v. Miller*, [1926] A.C. 518.

<sup>6</sup> *R. v. Crewe; Sekgome, Ex parte*, [1910] 2 K.B. 576.

(3) There still remain for consideration on the ground of its historical importance the territories acquired by Chartered Companies ruling as sovereign states under the protection of the Government at home, with powers exercisable under the supervision of a High Commissioner, himself a servant of the Colonial Office, as in the case of Northern and Southern Rhodesia.

The charter of the South African Company<sup>1</sup> enabled it to acquire territory, to make ordinances, and to exercise jurisdiction, subject to the approval and continuous supervision of the Secretary of State. A good illustration of the practical working of this process can be seen in the Matabeleland Order in Council of 1894.<sup>2</sup> The charter incorporates the company and confers upon it powers of the nature described above. The Order in Council brings a territory within the limits of these general powers, prescribes definite rules for their exercise, and enables the Secretary of State from time to time to declare that any parts of South Africa south of the Zambezi river, and *under the protection* of Her Majesty, shall be included in the limits of the Order. A series of Orders in Council was issued until in 1923-4 the company surrendered all governmental powers, and Southern Rhodesia became a colony and Northern Rhodesia a protectorate of colonial type.

(4) Reference has been made to somewhat anomalous temporary rights which were enjoyed from 1878 to 1914 by the Crown in Cyprus and still exist in the district of Kowloon. Weihaiwei from 1899 to 1931 was similarly under lease. These territories were, however, under the definite and exclusive government of the Colonial Office, while the British use and occupation of them continued.

(5) Egypt and the Sudan present aspects of British influence and control of a character too complicated and too much involved in political and international relations to be suitable for discussion here. But they cannot be passed over.

Egypt was governed by the Khedive and his ministers, under the suzerainty of the Sultan: but under what are known as the Capitulations a right to the administration of their own civil and criminal law by their own Consuls was

<sup>1</sup> *London Gazette*, 20 Dec. 1889.

<sup>2</sup> 18 July 1894.

enjoyed by the subjects of about fifteen foreign states,<sup>1</sup> while the economic difficulties into which Egypt was plunged under Ismail Pasha brought about an international control of Egyptian finance.<sup>2</sup> Two of the great powers, England and France, have long been regarded as entitled to a preponderant voice in the affairs of Egypt, but owing to the course of events in 1882 England was compelled to intervene with a military force, and the armed occupation of Egypt by the forces of this country has continued ever since. The presence of British troops has given force to British advice administered by the Consul-General and a staff of advisers assigned to the various departments of Egyptian Government. Under this strange system of government by advice from persons who were not, strictly speaking, officers of the Egyptian State, with no clear certainty as to what would happen if the advice was not taken, but under the general impression that it had better be followed, Egypt advanced in almost everything that concerns a nation's welfare.

In 1904 a Convention with France was signed in which, while the British Government declared that 'they have no intention of altering the political status of Egypt', the Government of the French Republic declared 'that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British Occupation or in any other manner'.<sup>3</sup>

It would seem that the relation of Egypt to this country was then that of an ill-defined and avowedly temporary protectorate.

In 1914 the outbreak of war with Turkey led to the declaration of a protectorate, extinguishing Turkish sovereignty, and a new ruler was installed. In 1922 the independence of Egypt was conceded, but subject to British rights as to (1) security of communications; (2) protection of foreigners; (3) protection of minorities, and (4) the Sudan. These issues are

<sup>1</sup> Milner, *England in Egypt*, ch. iv.

<sup>2</sup> Lord Cromer, *Modern Egypt*, vol. i, ch. x; Milner, *England in Egypt*, ch. viii. Some alleviation of the capitulatory régime was found in the creation of mixed courts which have jurisdiction in suits between foreigners and Egyptians, and foreigners of different nationalities.

<sup>3</sup> Lord Cromer, *Modern Egypt*, ii. 391. For recent history see Lord Lloyd, *Egypt since Cromer*.

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still outstanding, but Egypt is, in theory at least, a limited monarchy.

The status of the Sudan is distinct. The Sudan was abandoned, and ceased to be a part of the Ottoman Empire in 1886 after the death of Gordon and the fall of Khartoum. It was reconquered in 1898 by the arms and at the cost of Great Britain and Egypt. Shortly after the conquest Lord Cromer announced at Omdurman to the assembled Sheikhs that they would henceforth be governed by the Queen of England and the Khedive of Egypt:<sup>1</sup> and an agreement of 1899 was soon after signed between the representatives of England and Egypt providing for the government of the Sudan. The Governor-General is appointed by the Khedive (now King) on the advice of the British Government; he acts under its control only; his proclamations, issued with the advice of a council of officials, have the force of law; no foreign consul may reside in the country without our consent, and thus the tangle of the Capitulations was swept away.

The murder of the Sirdar, and unrest among the Egyptian troops in the Sudan in 1924 led to the removal of all Egyptian forces.

Egypt has been called the Land of Paradox, and her relations with England during the last sixty years have the elements of comedy, of tragedy, and of romance. The last two are prominent in the history of the Sudan.

## VI. MANDATES

The mandatory system was introduced by the Peace Conference under pressure from the President of the United States as a mode of dealing with territories liberated from the control of Germany and Turkey on the score of misrule, without adopting the crude substitute of annexation. The whole purpose of the system according to Article 22 of the Covenant of the League is to make the well-being and development of the peoples of territories, held not to be able to stand by themselves under modern conditions, a sacred

<sup>1</sup> Cromer, *Modern Egypt*, ii. 115-18. See Sir H. Macmichael, *The Anglo-Egyptian Sudan* (1934).

trust of civilization. Accordingly the territories in question were allocated to those Powers whose geographical situation, experience, and resources rendered it appropriate that they should undertake responsibility for them as mandatories of the League.

### *Class A Mandates*

Three classes of mandate were recognized. Class A covers those territories which by administrative advice and assistance might be enabled to stand alone. To the United Kingdom were allocated Iraq and Palestine. The former territory never accepted the mandate as justified, but was recognized by treaty with the United Kingdom as a sovereign state, and after some delay was finally admitted in 1932 a member of the League of Nations, its relations with the United Kingdom being regulated by a treaty of alliance,<sup>1</sup> which provides for co-operation in foreign policy and for the stationing of British air forces in Iraq. A judicial system has been introduced, with British assistance, which secures the impartial administration of justice to foreigners, and the country has a constitution on the lines of a limited monarchy. In 1933 the excesses of the Iraqi army in repressing alleged unrest among the Assyrians in the territory caused the latter to appeal to the League Council, and illustrated the difficulties arising from the position of the United Kingdom in regard to Iraq.

In the case of Palestine the mandate accorded was complicated by the inclusion in it of the obligation of the mandatory power to further the promotion of a national home for the Jewish people in that territory. This requirement has run counter to the aim of enabling the people of Palestine to acquire self-government as in the case of Iraq, since, if the majority of the inhabitants, the Arabs, were accorded political power, they would be opposed to Jewish immigration. It has, therefore, been impossible to establish constitutional government, the Arabs having refused in 1922 to elect members to a proposed Legislative Council, and the High Commissioner, therefore, governs with the aid of an Executive Council, but legislates on his own authority, though he consults an official

<sup>1</sup> 30 June 1930, supplemented by a judicial agreement, 4 Mar. 1931; Cmd. 3797 and 3933.

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Advisory Council. The Constitution is based on Orders in Council<sup>1</sup> under the Foreign Jurisdiction Act, 1890, and in the *Urtas Springs Case*<sup>2</sup> it was ruled that it was for the executive government to decide what steps it could take in accordance with the general terms of the mandate, and that such issues were not suited for decision by the courts.

### *Class B Mandates*

Class B of mandates covers those territories in Central Africa where the people are too politically backward to be able to do without close control. The right to administer, therefore, is conceded to the mandatory under conditions designed to secure freedom of conscience and religion, subject to morality and order; the prohibition of the slave trade, the arms traffic, and the liquor traffic; the prevention of the establishment of fortifications or naval and military bases or the military training of the natives except for local defence; and the provision of equal opportunities for the trade and commerce of other members of the League. This régime has been applied to Tanganyika under mandate to the British Government. The mandate permits the constitution of the territory into a customs, fiscal, and administrative union or federation with adjacent territories under British sovereignty or protection, but owing to objections on the part of Germany and also to administrative difficulties this step has not been taken. The territory, therefore, is governed under an Order in Council on the lines of a protectorate,<sup>3</sup> the Governor being aided by an Executive Council and a nominated Legislative Council.<sup>4</sup> Its tariff is assimilated to that of Kenya and Uganda.

Togoland under British mandate is administered along with the Northern Territories of the Gold Coast in its northern section, and with the Eastern Province of the Gold Coast Colony in its southern section.<sup>5</sup> The Governor of the Gold Coast legislates for either part. The Cameroons under British

<sup>1</sup> 10 Aug. 1922; 4 May 1923 (S.R. & O., 1922, Nos. 1282, 1283; 1923, No. 619).

<sup>2</sup> *Jerusalem and Jaffa District Governor v. Suleiman Murra*, [1926] A.C. 321.

<sup>3</sup> Order in Council, 22 July 1920 (S.R. & O., 1920, No. 1583).

<sup>4</sup> Order in Council, 30 Apr. 1926 (S.R. & O., 1926, No. 991).

<sup>5</sup> Order in Council, 11 Oct. 1923 (S.R. & O., 1923, No. 1284).



mandate are administered in the northern area as part of the Northern Provinces of Nigeria, in the southern as part of the Southern Provinces, the Governor legislating for the northern area, the Governor and Legislative Council for the southern.<sup>1</sup>

### *Class C Mandates*

Class C of mandates is represented by territories which can best be administered as an integral part of the territory of the mandatory, subject to the safeguards above-mentioned in the interest of the natives. This means that the mandatory can apply his own immigration restrictions and tariff laws. Western Samoa is thus held in mandate by New Zealand, New Guinea by the Commonwealth of Australia, and South-West Africa by the Union of South Africa, while Nauru, a phosphate-bearing island, is allocated to the British Empire, but by agreement between the United Kingdom, New Zealand and the Commonwealth of Australia is administered by the latter.

There is a curious complexity in the constitutional régime in each of these cases. New Zealand accepted the view acted on by the British Government for its mandates that the Foreign Jurisdiction Act, 1890, applied. Accordingly by Order in Council<sup>2</sup> under it there was granted to the Government and Parliament of New Zealand full power of administration and legislation, and under these powers a constitution has been created by New Zealand Acts. The Administrator legislates with a Legislative Council of from four to six officials, two elected Europeans, and two Samoans appointed by the Governor-General of New Zealand.

In the case of the Commonwealth mandate it was held that the Constitution permitted legislation on the ground that the territory had been placed by the Crown under the control of the Commonwealth, or on the ground that the British treaty of Peace Act, 1919, permitted action.<sup>3</sup> The area is administered by an Administrator with an Executive Council and a nominated Legislative Council.

<sup>1</sup> Order in Council, 26 June 1923 (S.R. & O., 1923, No. 1621).

<sup>2</sup> 11 Mar. 1920 (S.R. & O., 1920, No. 569); see Keith, *Journ. Comp. Leg.* xi. 260-2; xvi. 295; *Nelson v. Brailsby*, [1934] N.Z.L.R. 559.

<sup>3</sup> Keith, *The Constitutional Law of the British Dominions*, p. 320.

In the Union it was held that the status acquired by the Union under the peace settlement and the grant of the mandate authorized legislation, it being covered by the existing authority to legislate for peace, order, and good government. Under this power a legislature has been created with wide powers, the German residents in the territory having, by agreement with Germany, been rendered nationals of the Union and British subjects in the Union. Final control remains with the Union Parliament, and immediate progress in the direction of converting the territory into a fifth province of the Union has been blocked by the views of the German population, which objects to incorporation, and by financial considerations. The League of Nations Mandates Commission has criticized apparent claims by the Union to sovereignty over the territory, but, while conceding some points of form, the Union has maintained that it has the real rights of sovereignty, and the Appellate Division of the Supreme Court has ruled that rebellion on the part of a native in the territory is treason.<sup>1</sup>

The case of Nauru is covered by Acts passed in the Parliaments of the three partners in the control of the territory. The Administrator is controlled by the Commonwealth Government, and has legislative power. The phosphate deposits are worked by a Commission, but that body has no governmental authority, merely existing to exploit the commercial rights of the three governments which were acquired by purchase from the Pacific Phosphates Co., which had itself acquired them from German ownership. The Administrator is required to secure that the exploitation of the deposits shall be conducted so as not to destroy the economic position of the inhabitants.<sup>2</sup>

It is unnecessary to discuss the general issues regarding mandates or the academic issue of sovereignty. The mandates were allocated in each case by the principal Allied Powers, and their terms were approved by the League Council. It does not appear that the Council has any power to revoke a mandate except for breach of its terms. In case of disputes between the mandatory and other members of the League

<sup>1</sup> *R. v. Christian*, [1924] S. Afr. A.D. 101.

<sup>2</sup> Keith, *op. cit.*, p. 457.

arising out of the mandates, recourse is open to the Permanent Court of International Justice, which has been invoked in certain issues arising in Palestine. Any alteration in the terms of the mandate requires the assent of the League Council. Each mandatory must present an annual report to the League, and these reports are examined by a Permanent Mandates Commission, the majority of whose members represent powers not being mandatories. The criticisms of the Commission if endorsed by the League Council carry great weight, and there is abundant evidence in the records of the League of the efforts made by the mandatories to meet as fully as possible objections taken by the Commission. Thus the British Government has modified its terminology to make it clear that the Cameroons and Togoland are not in any sense British territory and the Union of South Africa modified its legislation to exclude apparent claims of dominion proper over South-West Africa.

## VII. THE EMPIRE OF INDIA

### § 1. THE EMPEROR OF INDIA

The acquisition of sovereignty of India was slow and uncertain. The Company of Merchants of London trading to the East Indies who received a charter from Elizabeth in 1600 was a new trading body which was dependent on the grants of the Mogul Emperors for permission to trade, and the right to settle domestic disputes within the walls of its factories. It was only in 1641 that a grant from a Hindu prince accorded full control and jurisdiction at Madras (Fort St. George) on payment of tribute, a grant acquiesced in by the Kingdom of Golkonda on its acquisition of the area which earlier was under Hindu rule, and on the conquest of that Kingdom in 1687 by the Mogul Emperor.<sup>1</sup> In 1668-9 a royal grant placed the island of Bombay under the Company's control; the King had over it full sovereignty as it was part of his wife's dowry, and Portugal which ceded it on her marriage had claimed full sovereignty. But it was only in 1698 that a grant in *zamindari* could be obtained of the site

<sup>1</sup> *Cambridge History of India*, v. 88, 589 f.

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of part of Calcutta,<sup>1</sup> and the Company assumed full responsibilities of rule only after Plassey (1757). Even then the Company's position was merely that of a dependent of the Emperor holding the powers of revenue collection and civil administration (the *divani*) by his grant in respect of Bengal, Bihar, and Orissa (1765), and the control of military defence, police administration, and criminal justice by successive agreements with the Nawab of Bengal, who rapidly became a mere nominal ruler. In 1773 the payment of the tribute promised in 1765 was refused, and never resumed, though the overlordship was not repudiated formally. In the Regulating Act of 1773 and in Pitt's Act of 1784 there is a deliberate avoidance of definition of sovereignty, and the treaties of Paris (1763) and of Versailles (1783) make no assertion of sovereign power, though in commercial negotiations with France in 1786 the assertion of its existence was made,<sup>2</sup> but naturally not accepted by the French negotiators. Not until 1813 on the renewal of the Company's charter do we find the assertion that the territories in its control was subject to the undoubted sovereignty of the Crown, and in 1814 France and the Netherlands in their treaties admitted expressly that sovereignty. But it is not possible to define exactly at what point the sovereignty became applicable to the various territories which by agreement, conquest, or extinction of Indian sovereign rulers (as in the case of Tanjore and the Carnatic) fell under the Company's control.

The formal overlordship of the Emperor was not at first contested but it was minimized by Lord Hastings, and in 1835 coinage ceased to be struck in the Imperial name. Finally, in 1858 the end of the dynasty was brought about in view of Bahadur Shah's implication in the Sepoy revolt. The assumption of direct control by the Crown and the extinction of the Company's activities as a governing body had very important effects on the relation between the Indian States and the power which now stood out alone as paramount in fact and in form in India. The Crown now became entitled

<sup>1</sup> *Lyons Corpn. v. East India Co.* (1836), 1 Moo. P.C. 175. The Company in practice exercised its rights of jurisdiction as *zamindar* free from the normal governmental control, by buying off the officials who should have exercised it.

<sup>2</sup> *Cambridge History of India*, v. 595 ff.

to the allegiance and loyalty of the rulers of the States, and this fact was fittingly signalized in 1876 by the assumption under the authority of an Imperial Act<sup>1</sup> of the style of Empress of India by Queen Victoria.

India thus falls into (1) British India, a dominion of the Crown, and (2) the Indian States, which are not British territory. But the distinction is constitutional, not international. In the latter aspect India is a unit and as such figures in the membership of the League of Nations.

## § 2. THE CROWN AND THE STATES

The definition of the relations of the Crown and the States has long been in dispute. It is clear that in the early days of the Company under its status as a vassal of the Emperor it was on a footing of equality with other vassals of the Empire, and it concluded treaties on a footing of equality and on terms similar to those of international law treaties.<sup>2</sup> But from 1813 the terms accorded were always those of subordination and isolation; each State was treated as a separate unit whose relations were to be rigidly limited to those with the Company, which must not make war or negotiate with any other power or State, and must aid its suzerain in case of need. In return the Company usually disclaimed any intention of interference in the internal affairs of the State. In practice the policy tended to result in gross misrule which could be remedied only by annexation, as in the cases of Coorg (1834) and Oudh (1856). The Company from 1841 favoured any honourable acquisition of territory, and approved Lord Dalhousie's application of the doctrine of the lapse to the Company of States tributary to it on the failure of natural heirs. Thus Nagpur, Jhansi, Satara were acquired; the titles of Nawab of Tanjore and the Carnatic extinguished, and the pension of the last Peshwa discontinued to the successor to his private fortune.<sup>3</sup>

The mutiny resulted in a change of plan, especially as the

<sup>1</sup> 39 Vict. c. 10; Proclamation 28 Apr. 1876.

<sup>2</sup> But international law had not extended its ambit to India, and it was never there adopted; the Mogul ideal admitted only a paramount power and subordinates, not a number of equals.

<sup>3</sup> See Lee Warner, *The Native States of India* (1910); *Cambridge History of India*, vol. v, ch. xxxii; *The British Crown and the Indian States* (1929).

States had remained on the whole loyal in the crisis. *Sanads* of adoption were granted in 1860 to Hindu princes, and the Mohammedan rulers were assured of the recognition of successors according to Mohammedan law. Moreover, the policy of disregarding misrule was abandoned, and rulers were urged to adopt such reforms as the abolition of the burning of widows, of infanticide, and of torture, and the promotion of irrigation, sanitation, public health, and education. They were expected to co-operate by affording facilities for through railway communication, for posts, telegraphs, and telephones, for the control of opium and salt production, the construction of military roads, &c. The strict terms of their treaties were often disregarded, and the Political Department adopted the plan of applying generally such principles as seemed just, if they were contained in treaties with the greater States, to relations with other States. This process was promoted by the re-establishment of Indian rule in Mysore in 1881, after British administration from 1830, for the treaty granting the power of government to the Maharaja contained elaborate stipulations representing an ideal of British control.<sup>1</sup>

The subordination of the States was emphasized by the trial and deposition of the ruler of Baroda in 1875, for he was accused of disloyalty, though deposition ultimately was based on misrule, and by the punishment of the usurping Raja and the execution of the Senapati of Manipur in 1891 on charges of treason in resisting the Commissioner of Assam on his mission to the State to expel the Senapati, and of murder in securing his execution and that of several of his entourage.<sup>2</sup> It was then expressly laid down that the relations of the States with the Crown were not governed by international law (as even Lord Dalhousie<sup>3</sup> had held in the case of Oudh, a State not created by the Company but older than it). The extent of the paramount power of the Crown as suzerain was further asserted in 1926 in the controversy with Hyderabad over the restoration of Berar. Lord Reading then insisted that it lay with the Crown alone in its discretion to determine

<sup>1</sup> *Cambridge History of India*, vol. vi, ch. xxvii.

<sup>2</sup> Cf. *Letters of Queen Victoria*, 3rd Ser. ii. 18 ff., 51.

<sup>3</sup> *Dalhousie Letters*, p. 363. In the earlier case of Coorg the whole procedure followed the ordinary lines of international law.

any disputed issue, and that its decision bound absolutely any State.

The Princes of late years had been more and more concerned as to their status, and on the other hand since Lord Minto's tenure of office it has been increasingly natural that the Princes should be brought into closer contact with the Crown through the joint interest in combating anarchy and communism. Hence the Montagu-Chelmsford reform scheme provided for a Chamber of Princes (1921), thus reversing definitely the policy of isolation, and giving the Princes a means of consultation on issues affecting them. It has also been agreed that disputes between the Crown and Princes shall normally be submitted for inquiry to a tribunal impartially constituted, though the decision rests with the Crown, and, as a further concession, in the case of a regular succession in any State recognition by the Crown is no longer necessary to give it validity as formerly. The paramountcy of the Crown, however, is still undefined.<sup>1</sup> It extends to intervention to decide disputed successions; to prevent gross misrule or absenteeism (as in the case of Dewas in 1933-4), to punish implication in crime (as in the case of Holkar in 1926), and to secure due education for heirs apparent and the security of the State during a minority. On the other hand, no right is claimed to insist on democracy in the States. Though many reforms have been introduced in certain States, the fact still is that in strict law such advisory councils for legislation as exist depend on the prince's pleasure; that he has full authority to determine all matters in the State; that there is no binding separation between State funds and the prince's privy purse; that the courts are under the prince's control; and that no legal securities exist for life or liberty or property.<sup>2</sup> On the other hand, as against the advantages of autocracy in local issues, must be set the fact that the Princes have no control over issues of customs and currency and other questions which are determined by British India without regard to the interest of the States.

Jurisdiction in the States is exercised by British authorities in certain cases. (1) Thus the State tacitly or formally

<sup>1</sup> See *Parl. Pap.*, Cmd. 3302 (report of Indian States Committee).

<sup>2</sup> See Barton, *The Princes of India* (1934), p. 319.

*delegates* or cedes jurisdiction over (1) British cantonments; (2) British Civil Stations; (3) railways running through the States;<sup>1</sup> (4) the residency jurisdiction over servants and dependants; and (5) that over European British subjects and other Europeans. But in certain cases of offences against local law only and taxation the State may be allowed to exercise jurisdiction over Europeans, or the Resident may deal with such cases, applying local law. It is not usual to claim the exemption of Hindu or Mohammedan British subjects from local jurisdiction. (2) In other cases the jurisdiction of the States is limited (e.g. in the States of Kathiawar, and formerly Kolhapur) and the *residuary* jurisdiction is exercised by the Agents of the Crown. Such jurisdiction is not subject to appeal to the Privy Council.<sup>2</sup> (3) In other cases, e.g. during a minority or the suspension of the functions of the ruler, jurisdiction may be exercised by the Resident in *substitution* for the State officers. The delegated jurisdiction at any rate is exercised under the Indian (Foreign Jurisdiction) Order in Council, 11 June 1902, which, originally passed under the Foreign Jurisdiction Act, 1890, was validated by the Government of India Act, 1916.<sup>3</sup>

As a rule the British Parliament does not legislate for the States or their subjects, but, as the Crown is responsible for the external relations of the States, Parliament has legislated to control such subjects as regards the slave trade,<sup>4</sup> and generally such subjects fall under the exercise in foreign countries of the jurisdiction of the Crown exercised under the Act of 1890.<sup>5</sup>

States are required to extradite offenders to British India, and in return offenders from the States are handed back.

The ruler of a State is exempt in British India from jurisdiction, except with the assent of the Governor-General. But this does not apply to such princes as holders of land in British India in respect of such land. In England they are treated as exempt from jurisdiction.<sup>6</sup>

<sup>1</sup> *Muhammad Yusuf-ud-din v. Queen-Empress* (1897), L.R. 24 Ind. App. 137.

<sup>2</sup> *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, [1906] A.C. 212.

<sup>3</sup> 6 & 7 Geo. V, c. 37, s. 5.

<sup>4</sup> 39 & 40 Vict. c. 46, s. 1; Slave Trade Offences (India) Order in Council, 14 Oct. 1913.

<sup>5</sup> 53 & 54 Vict. c. 37.

<sup>6</sup> *Cf. Statham v. Statham*, [1912] P. 92.



## § 3. THE GOVERNMENT OF BRITISH INDIA

Under the régime of Crown control from 1858, as Parliament was the controlling authority over India, the system of government was based on the enforcement of full responsibility, by according to the Governor-General in Council, subject to the Secretary of State in Council, absolute control of all government and finance. The Secretary of State was enabled to exercise his authority because of his Council, a body at first appointed for life,<sup>1</sup> then for ten years, now reduced to five, whose members supplied the necessary familiarity with Indian affairs. He had, save in secret matters (such as war and peace and treaties) or urgent matters, to consult his Council, and in certain matters the assent of Council was required; these included (1) the appropriation of Indian revenues; (2) borrowing money in the United Kingdom on the security of Indian revenues; (3) the purchase, sale or mortgage of property; (4) the regulation of Indian patronage and certain matters affecting appointments. Further, the Secretary of State in Council, in succession to the Company, was rendered liable to suit on all matters not essentially political in character.

The Governor-General in Council subject to his duty of obedience to the Secretary of State controlled Indian Government. Prior to the reforms of 1919 his responsibility was absolute, and any relaxation of control was merely administrative and confined to minor financial detail, a gradual process of devolution of finance having been begun in 1870. Legislation for India as a whole was effected by the Governor-General in legislative council which contained an official majority and only an elected minority.<sup>2</sup> The Governor-General had also and still retains the power of issuing legislative Ordinances which take effect for six months but can, of course, be renewed.<sup>3</sup>

The central authority being clearly inadequate for control of the whole of Indian affairs, the country was divided into (1) provinces<sup>4</sup> under Lieutenant-Governors, which in 1919 were the United Provinces of Agra and Oudh, the Punjab,

<sup>1</sup> 21 & 22 Vict. c. 106, s. 10; 32 & 33 Vict. c. 97, s. 1; 39 Vict. c. 7, s. 1; 9 & 10 Geo. V, c. 101, s. 31.

<sup>2</sup> 5 & 6 Geo. V, c. 61, ss. 63-5.

<sup>3</sup> Ibid. s. 72.

<sup>4</sup> Ibid. ss. 53-7.

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Bihar and Orissa, and Burma. (2) Presidencies, under Governors, namely, Madras, Bombay, and Bengal.<sup>1</sup> (3) Commissionerships,<sup>2</sup> under Chief Commissioners, namely, the Central Provinces and Assam. Executive Councils were possessed by the Presidencies, and Bihar and Orissa. All had legislative Councils, nor were official majorities insisted upon, but each Government had power to secure any legislation desired, and in case of emergency, as in the Moplah rising, the Ordinance power of the Governor-General could be invoked. The existence of Councils for executive purposes was not intended to take away the responsibility of the Governor-General or Governor, for it was provided from 1784 that the head of the government could override his Council in executive business.<sup>3</sup>

There was no division of subjects between the centre and the local authorities as regards legislation, the local legislature having power only as regards the local area. But no local Act could be enacted on a long list of subjects (public debt, customs, &c., currency, post office, penal code, religious rites, defence, foreign relations, patents and copyright) without prior assent of the Governor-General; every measure assented to by the Governor must for effect be assented to by the Governor-General, and might be disallowed by the Crown. But any Act assented to was valid if not repugnant to any Act of Parliament.<sup>4</sup> The Indian Legislature was not allowed to legislate without the assent of the Governor-General<sup>5</sup> on public debt and charges on Indian revenues; defence; religious rites; and external affairs.

In addition to legislation the Legislatures were allowed from 1909 the power of discussing and moving resolutions on the budget,<sup>6</sup> and of moving resolutions on any matter (subject to the Governor's power of disallowance) as well as of asking questions and supplementary questions. Prior to 1892 legislation alone was allowed under the Indian Councils Act, 1861.

The Government's functions in the higher branches were fulfilled through the Indian Civil Service,<sup>7</sup> which was re-

<sup>1</sup> 5 & 6 Geo. V, c. 61, ss. 46-51.

<sup>2</sup> Ibid. ss. 41, 50, 55.

<sup>3</sup> Ibid. s. 67.

<sup>4</sup> Ibid. ss. 67 (3), 80 (3).

<sup>2</sup> Ibid. s. 57.

<sup>4</sup> Ibid. ss. 79-82.

<sup>7</sup> Ibid. ss. 97-100.

cruited by competitive examination held in England and was therefore mainly European, and the Indian Police, also mainly European; the minor services were partly provincial in character, and in increasing numbers recruited in India.

The judicial system under the Company's rule was carried on in two branches; the Supreme Courts created by Imperial Acts with a jurisdiction restricted in area as regards natives but general as regards Europeans; and the Courts created by the Company with jurisdiction primarily in all matters affecting natives, as opposed to Europeans who were subject to the Supreme Courts. In 1861 there was erected a unified system, which was gradually extended.<sup>1</sup>

#### § 4. THE MONTAGU-CHELMSFORD REFORMS

The war services of India gave her the right to expect the grant of the self-determination for which the Allies had claimed to be fighting, while the prolongation of the war and war-weariness had excited hopes for the extension of self-government. A promise was, therefore, given<sup>2</sup> for the increasing association of Indians in every branch of administration and for the gradual development of self-governing institutions with a view to the progressive realization of responsible government in British India as an integral part of the Empire. The plan to effect this end was devised by Mr. Montagu, Secretary of State, and Lord Chelmsford, the Governor-General,<sup>3</sup> and given legal effect by the Government of India Act, 1919, based on the views of a Joint Select Committee of Parliament. The scheme became operative in 1921, when the Duke of Connaught opened the new Indian legislature at Delhi, the capital since 1912 of India.

The essential feature of the reforms was the creation of dyarchy in the provinces, with unity in the centre. In the latter case the central legislature was much strengthened in personnel and made bicameral, the chambers having in the main equal powers.<sup>4</sup> The Assembly of 144 members was

<sup>1</sup> Ibid. ss. 101-13. The highest Company Courts were the Sadr Courts, which were merged with the Crown Courts into the present High Courts. There was much vagueness earlier as to jurisdiction over Europeans not being British subjects, and as to certain classes of Indian British subjects.

<sup>2</sup> E. Montagu, House of Commons, 20 Aug. 1917.

<sup>3</sup> *Parl. Pap.*, Cd. 9109.

<sup>4</sup> 9 & 10 Geo. V, c. 101, ss. 17-22.

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mainly elective, and the Council of State of sixty members had an unofficial majority, mainly elective. The legislature thus ceased to be under the control of the Government, but the Governor-General could, with the assent of one house or without even that assent, secure the enactment of any legislation desired. For the first time voting of expenditure was provided for, but the Governor-General was given power to restore votes reduced by the Legislature and to order any expenditure considered by him necessary for the safety or tranquillity of British India or any part thereof. But the Legislature was not given control over interest and sinking fund on loans; expenditure provided for by law; salaries and pensions of officers appointed by or with the approval of the Secretary of State in Council; and expenditure classified as (a) ecclesiastical, (b) political, or (c) defence.

In the provinces, on the other hand, government was divided into branches, part controlled by the Governor in Executive Council, under responsibility to the Governor-General, part by the Governor with a minister or ministers, the latter responsible to the Legislature, but subject to an overriding power on the part of the Governor, who could order action to be taken without regard to the ministerial advice.<sup>1</sup> The division of subjects<sup>2</sup> was based on a preliminary delimitation of central and provincial subjects. Among the latter questions of local self-government, medical administration and public health, education (other than European and Anglo-Indian<sup>3</sup> education), local public works, agriculture and veterinary matters, fisheries, co-operative societies, forests in Bombay and Burma, excise, religious and charitable endowments, development of industries, &c., were entrusted to ministers; on the other hand the official side of the government dealt with land revenue administration and irrigation and famine relief, the administration of justice, police, coroners, criminal tribes, prisons, control of the press, certain industrial matters, elections, audit of local funds, control of the public services, and control of revenue and borrowing.

<sup>1</sup> 9 & 10 Geo. V, c. 101, ss. 2-6.

<sup>2</sup> The Devolution Rules (Notification No. 308 S., 16 Dec. 1920), Sched. I.

<sup>3</sup> This term now denotes persons of mixed origin, formerly called Eurasians. Its older use was to describe Europeans connected with India by residence.

The allocation of funds between the two sides of government was made by the Governor, and a strict system of financial supervision secured due control in expenditure.

The legislatures<sup>1</sup> were increased in size and at least 70 per cent. of the members were made elective, and not more than 20 per cent. could be official. Their powers were made subject to prior assent by the Governor-General in respect of legislation affecting central subjects, repeating with modifications the existing rule, but the power to vote expenditure was added. But the Governor might enact legislation necessary for peace and tranquillity, and might restore votes reduced, if for reserved matters; in transferred matters he was given only the power to order expenditure necessary for peace and tranquillity of any part of the country and the carrying on of any department. Legislation required the assent of Governor and Governor-General, and might be disallowed by the Crown. But it could not be impugned as inconsistent with prior legislation of any legislative body save Parliament.

The powers of the Crown's representative were so great under the scheme that the ministers did not succeed in securing effective responsibility. The official bloc in the legislature tended to prevent the development of party government, and lack of funds rendered impossible the development of services bearing on national development.

The financial settlement between provinces and the centre led to a distribution of resources, though a clear-cut allocation of funds proved impossible. The provinces<sup>2</sup> obtained receipts accruing in respect of provincial subjects, including all land revenue and revenue from irrigation, a share in the increase of revenue from income tax, and the sums produced from the imposition of fresh taxation within a specified list.<sup>3</sup> The list includes taxes on non-agricultural land, successions, betting, advertisements, amusements, luxuries, registration fees, and stamp duties (other than those—chiefly commercial—imposed by Indian legislation). At first the provinces had to pay contributions to the centre, but with improved finance this ceased.

<sup>1</sup> 9 & 10 Geo. V, c. 101, ss. 7-13.

<sup>2</sup> See the Devolution Rules (1920) Part II, Financial Arrangements.

<sup>3</sup> The Scheduled Taxes Rules (1920).

The creation of stronger legislatures to which in some matters ministers were responsible altered the responsibility of the Secretary of State. Where ministers were responsible, the Secretary of State was not, and under the Act of 1919<sup>1</sup> he was empowered to make rules as to relaxation of control. Under this power he restricted his interference<sup>2</sup> to the (1) safeguarding of the administration of central subjects; (2) decision of questions between two provinces; (3) safeguarding of Imperial interests; (4) determining the position of British India in respect of questions arising between India and other parts of the Empire; (5) safeguarding of the duties of the Secretary of State in respect of (a) the High Commissioner for India, a new office created under the Act to take over the commercial duties of the India Office;<sup>3</sup> (b) borrowing on the security of the provincial revenues;<sup>4</sup> (c) the civil services.<sup>5</sup> The restriction is confined to transferred matters, relaxation in control in reserved issues being a matter for his discretion. The Secretary of State's Council was reduced to from eight to twelve members, and greater power was given to him to regulate its proceedings.

For the control of the Civil Services the system of creating a Public Service Commission was adopted, with wide powers to prevent political interference in the control of the services.<sup>6</sup>

## § 5. THE FUTURE GOVERNMENT OF INDIA

The imperfect operation of the reform scheme evoked a violent political movement headed by the Indian National Congress in order to secure the grant of Dominion Status. The demands made secured the appointment earlier than provided by the Act of 1919 of a Commission to report on the working of the scheme, under Sir John Simon's chairmanship. The report<sup>7</sup> of that body suggested responsible government in the provinces, but not in the centre, and stressed the importance of securing the support of the States in any settlement. At this juncture it appeared that the States

<sup>1</sup> 9 & 10 Geo. V, c. 101, s. 33.

<sup>2</sup> Government of India Notification No. 835 G., 14 Dec. 1920.

<sup>3</sup> 9 & 10 Geo. V, c. 101, s. 35; S.R. & O., 1933, No. 217.

<sup>4</sup> *Ibid.* s. 2.

<sup>5</sup> *Ibid.* ss. 38-40.

<sup>6</sup> 9 & 10 Geo. V, c. 101, s. 38. Similar action was taken in Madras.

<sup>7</sup> *Parl. Pap.*, Cmd. 3568, 3569.

might consider federation, and a series of meetings of a Round Table Conference<sup>1</sup> from 1930 to 1933 resulted in a governmental scheme<sup>2</sup> which was in 1933-4 submitted to a Joint Select Committee of Parliament. The Committee approved the scheme subject to certain alterations in detail, and its report received the concurrence of both Houses of Parliament.

The scheme envisages (1) a true federation with a legal delimitation of powers; (2) the construction of the federal legislature on the basis of according 40 per cent. representation in the Upper House to the States, with representation in the Lower House according to population; (3) the concession of responsible government at the centre, but to the exclusion of (a) defence, (b) external affairs, (c) ecclesiastical affairs, connected with the provision of facilities for ministration to Europeans. In other matters the Governor-General is to have a special responsibility in respect of (1) the prevention of grave menace to the peace and tranquillity of India or any part thereof; (2) the safeguarding of the financial stability and credit of the federation; (3) the safeguarding of the legitimate interests of the minorities; (4) the safeguarding of the public services; (5) the prevention of commercial discrimination; (6) the protection of the interests of the States in matters outside the federal sphere; and (7) matters affecting the administration of the departments under his control.<sup>3</sup> The Governor-General is to have legislative and financial powers to carry out his responsibilities.

In the provinces<sup>4</sup>—to be increased by the addition of Orissa and Sind, the North-West Frontier Province having already been called into being—full responsible government is to be accorded, subject to special responsibilities of the Governor similar to those of the Governor-General. But he is not required to protect financial stability, while he is required to obey orders of the Governor-General and to exercise powers in respect of areas which, owing to the conditions of their population, require to be treated apart from the ordinary

<sup>1</sup> *Parl. Pap.*, Cmd. 3778 (12 Nov. 1930-19 Jan. 1931), 3972, 3997 (7 Sept.-1 Dec. 1931).

<sup>2</sup> *Parl. Pap.*, Cmd. 4268.

<sup>3</sup> Cmd. 4268, pp. 41, 42. The Joint Committee (Report, i. 205 f.) adds the duty to prevent fiscal discrimination against British imports.

<sup>4</sup> *Ibid.* p. 55.

administration. The system of placing parts of provinces under a special régime is of long standing; the Governor-General since 1870 has had power in Council to approve regulations framed by the local government to the exclusion of the ordinary law.<sup>1</sup>

The scheme provides for a wide extension of the franchise; for the safeguarding of the rights of the Indian Civil Service and the Police Service which are still, for some years, to be recruited in part in the United Kingdom; for the creation of a federal court with jurisdiction in issues between federation and provinces and states, upon which later jurisdiction in ordinary appeals from the provinces may be conferred, and for the possible creation of a Court of Criminal Appeal.<sup>2</sup>

Indian defence will remain an Imperial responsibility but steps have been taken to set about the indianization of an infantry division, a cavalry brigade, and even of artillery, and an air force is being organized, while the British Government makes a grant of £1,500,000 a year towards the cost of Indian defence, because Indian forces are of great value for immediate service in the Far East, and India offers an exceptional training-ground for active service. To naval defence India offers only the tiny contribution of £100,000 a year, but it is possible that an effective Indian navy may later be evolved. From 2 Oct. 1934 the Indian Marine has formally been converted into the Indian Navy in accordance with the Government of India (Indian Navy) Act, 1927.

<sup>1</sup> 33 & 34 Vict. c. 4; 5 & 6 Geo. V, c. 61, s. 71. One area only, in Assam, will be wholly outside ministerial control; in others the Governor will have a special responsibility.

<sup>2</sup> In this case only would a final appeal to the Privy Council be forbidden, except where issues of constitutional law arise when the federal court would decide such questions, subject to appeal to the Council as usual.



## CHAPTER VIII

### THE CROWN AND FOREIGN RELATIONS

FOR external purposes the Crown represents the community. No person or body save the King, by his ministers or his accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large. In acting for the people he does not act as a trustee for an individual, so as to render it right to claim from the Crown moneys paid to it under a treaty with a foreign power.<sup>1</sup> Nor may the Crown by contract hamper in war time its freedom of action under the prerogative in matters concerning the welfare of the State.<sup>2</sup>

The prerogative of the Crown in this respect is exercised, subject always to the collective responsibility of the Cabinet, through one of His Majesty's Principal Secretaries of State, to whom is entrusted the business of communicating with the representatives of foreign states in this country, and with our own representatives in other communities.

#### § 1. THE FOREIGN OFFICE

The Secretary of State for Foreign Affairs is assisted by two Under Secretaries of State, one of whom is political, the other permanent; two deputy and two assistant Under Secretaries, a Librarian, and a staff of clerks.<sup>3</sup> The Parliamentary head of the Department of Overseas Trade, who is appointed by the Secretary of State and the President of the Board of Trade, acts as an extra Under Secretary.

The Secretary of State has certain formal duties, such as the presentation of the representatives of other powers to the Sovereign: he is also the channel of communication between individuals or departments of government and foreign

<sup>1</sup> *Civilian War Claimants Assocn. Ltd. v. R.*, [1932] A.C. 14; *Rustomjee v. R.* (1876), 1 Q.B.D. 487, at p. 497.

<sup>2</sup> In *Rederiaktiebolaget 'Amphitrite' v. The King*, [1921] 3 K.B. 500, it was held that damages could not be recovered by petition of right for failure of the Crown to make good an undertaking to allow a ship to leave England, though it had entered on the strength of an assurance of permission.

<sup>3</sup> Tilley and Gaselee, *The Foreign Office*, p. 261.

countries in any matter in which the intervention of a foreign government may be sought; but the most serious part of his business consists in framing and carrying out a policy for this country in relation to other countries. For this last purpose he must be in constant communication with the representatives of foreign Powers in this country, and with our diplomatic agents abroad, who are responsible to him for their action, as he is responsible to the Cabinet and to Parliament. The Cabinet is entitled to full information on foreign affairs, and the Crown is concerned especially with these issues.

Important dispatches, accordingly, from our ministers abroad, and, if necessary, the drafts of answers are sent to the Prime Minister, then to the King, and, as we have seen, time must, if desired, be given to the Sovereign to form an opinion upon important dispatches before they are sent; lastly, they are circulated among the members of the Cabinet. The Library of the Foreign Office is the ultimate depository of the transactions of the Office.<sup>1</sup>

## § 2. DIPLOMATIC AGENTS AND CONSULS

But it is obvious that important and pressing matters cannot be dealt with wholly by correspondence. So in all foreign civilized States of any importance the interests of this country are superintended by two classes of agents resident on the spot: diplomatic agents and consuls.

A diplomatic agent may, in point of dignity, be an ambassador or merely a *chargé d'affaires*. He may be permanently accredited to the Court of a foreign country, or he may be dispatched on a special mission: but in all cases he represents the State from which he is sent.

One State may refuse to receive or retain the diplomatic agent of another, either because it desires to break off all friendly relations and enter upon a state of war, or because the individual agent is personally disagreeable, or politically hostile to it, or because his reception would amount to an admission of claims which it does not recognize, as in the case of the papal legates of days before the English Reformation.

<sup>1</sup> Report of Committee on Diplomatic Service, *Parl. Pap.*, 1861, vi. 75. (Evidence of Mr. Hammond); Tilley and Gaselee, *The Foreign Office*, pp. 299 ff.

It was only under war conditions that relations with the Vatican were re-established.

The forms of appointment and the immunities of diplomatic agents may be properly dealt with here. The forms vary. Ambassadors and envoys plenipotentiary receive powers to treat and negotiate under the Great Seal, and also a letter of credence, under the sign manual, to the Sovereign or President of the country to which they are sent. A *chargé d'affaires* has no such ample powers, and his letter of credence is signed by the Secretary of State.

Persons thus accredited either by the King of this country to other States, or by other States to the King, enjoy certain immunities from the law of the land in which they reside.

It is sometimes said that such immunities, like privilege of Parliament, exist because they are necessary for the purpose of enabling those who enjoy them to discharge their duties without hindrance; but the more correct view seems to be that they rest on the representative character of the diplomatic agent. The immunities which would be due to his Sovereign are due to him. In one respect he is not merely free from, but outside of, the law of the State to which he is accredited. His children born there are not subjects of that State, but follow the nationality of their father.<sup>1</sup>

Besides this he is exempt from its criminal jurisdiction, though exceptions may be noted in which an ambassador, having taken part in conspiracies against the State to which he is accredited, has been arrested and kept in custody.<sup>2</sup>

He is also exempt from its civil jurisdiction. The limits of this exemption differ in different countries; so does the authority for the exemption. In some it rests on general principles of international law embodied in the common law of the land.<sup>3</sup> In some it is based on the same principles affirmed, as such, in a civil code. In our own country the exemption is a specific piece of Statute law making no pretension to embody any general principles, but passed admittedly to prevent the recurrence of a scandal.

<sup>1</sup> Dicey and Keith, *Conflict of Laws* (ed. 5), pp. 146, 147.

<sup>2</sup> Martin, *Causes Célèbres*, i. 103; Wheaton, *International Law* (ed. Keith), i. 460.

<sup>3</sup> So in the United States, France, and Germany.

The Act 7 Anne, c. 12, after reciting the insults offered to 'his excellency Andrew Artemonowitz Matneof, ambassador extraordinary of his Czarish Majesty, Emperor of Russia', who had been pulled out of his coach and detained, goes on to enact that

'To prevent the like insolences for the future be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by Her Majesty her heirs or successors, or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatever.'

But behind this enactment lies a general principle accepted by our Courts and reaching far beyond the exemption from civil process of an ambassador and his suite. This is laid down in the case of the *Parlement Belge*.

'We are of opinion', said Brett J., delivering the judgment of the Court of Appeal, 'that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any other state which is destined to its public use, or over the property of any ambassador, though such sovereign, property, or ambassador be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.'<sup>1</sup>

The civil immunity<sup>2</sup> extends to the suite and servants of a diplomatic agent, not apparently in their own right, but because of their necessity to the dignity or the duties of their master.<sup>3</sup> The question of the immunity of such persons from

<sup>1</sup> *The Parlement Belge* (1880), 5 P. D. 197. See also *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149; *Duff Development Co. v. Govt. of Kelantan*, [1924] A. C. 797.

<sup>2</sup> Cf. *Taylor v. Best* (1854), 14 C. B. 487; *Suarez, In re*; *Suarez v. Suarez*, [1918] 1 Ch. (C. A.) 176; *Dickinson v. Del Solar*, [1930] 1 K. B. 376.

<sup>3</sup> If the servant of an ambassador engage in trade he is liable under the

criminal jurisdiction is not settled. In England in case of a serious crime they would perhaps be held liable to the criminal law. In other countries the difficulty seems to be evaded by the readiness of the master to hand over the delinquent servant to justice.<sup>1</sup>

The territorial immunities of the house of a diplomatic agent are also doubtful. Where the agent himself is liable to be arrested on the grounds stated above, the privileges of his house end with his own; where a servant or member of his suite has committed an offence against the criminal law, it would seem that in England and France it is the practice to disregard the immunity of the house for the purpose of making the arrest. When the offence has been committed by a subject of the country to which the agent is accredited, it is obviously right that the law should take its course. In short, the house of a foreign minister does not appear to be, like a public ship in a foreign harbour, extra-territorial, but merely exempt from jurisdiction so far as is necessary to support the dignity of the minister and to enable him properly to discharge his duties.

A consul does not represent the State in its external relations to other States, unless, as sometimes happens, he is clothed with a diplomatic character in addition to his consular functions. Thus there is a commercial Diplomatic Service whose members are entitled to diplomatic privileges. Otherwise he is merely employed to attend to the interests of British subjects during their stay in the country wherein he is engaged to reside.

His business is to issue or affix a *visa* to passports for British subjects when needed, to authenticate documents, to celebrate marriages, to register births and deaths, and to take statements from captains of British ships as to injuries sustained at sea. He receives complaints of British subjects as to any injustice inflicted, and communicates with the local authorities, he administers, if permitted, the property of such as die bankruptcy laws; 7 Anne, c. 12, s. 5. It rests with the Secretary of State, not the Courts, to determine what persons are recognized as entitled to diplomatic status; *Engelke v. Musmann*, [1928] A.C. 433; Dicey and Keith, *Conflict of Laws*, pp. 197, 198.

<sup>1</sup> Wheaton, *International Law* (ed. Keith), i. 460 ff.

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in the country of his residence, and arbitrates on disputes which they may bring before him; he collects information, commercial and economical, and forwards it to the Foreign Office.<sup>1</sup>

Apart from Statute or Order in Council requiring a consul to exercise a jurisdiction possessed by the Crown in a foreign land, the consular office has no inherent judicial power. Such as is exercised by consuls may best be dealt with under the head of foreign jurisdictions.

A consul is appointed by commission or patent from the government of the country which employs him. This needs to be confirmed by an *exequatur*, a document issued by the government of the country wherein the consul's duties are to be discharged. In England such documents are issued from the Foreign Office. The *exequatur* may be refused or withdrawn if the consul should be personally unacceptable or should misconduct himself in the exercise of his office.

The immunities of a consul are of somewhat uncertain extent. Practically he is entitled to have his archives and other official documents treated as inviolable, and to be exempt from such personal liabilities (such as serving on juries or in the militia) as would interfere with the continuous discharge of his duties.<sup>2</sup>

### § 3. WAR, PEACE, AND TREATIES

The King, acting on the advice of his ministers, makes war and peace. The House of Commons may refuse supplies for a war, or either House may express its disapproval by resolutions condemnatory of the ministerial policy, or by address to the Crown, or by making the position of the ministry in other ways untenable: but Parliament has no direct means of bringing about a war or of bringing a war to an end.

Nor does a decided expression of opinion by the House of Commons always overbear the policy of a ministry. In 1782 a resolution of the House of Commons, followed by an address to the Crown, caused Lord North to take steps to end

<sup>1</sup> For a fuller account of consular duties and privileges, see Wheaton (ed. Keith), i. 480 ff., and treatises referred to.

<sup>2</sup> Cf. *Barbuit's Case* (1737), *Cas. temp. Talb.* 281; *Viveash v. Becker* (1814), 3 M. & S. 284, at pp. 288, 293, 298.

the war with the American colonies;<sup>1</sup> but in 1857 a resolution of the same House, condemnatory of the war with China, caused Lord Palmerston to appeal to the country, with the result that the electors affirmed his policy and returned a majority of his supporters to Parliament.<sup>2</sup>

The prerogative of the Crown in making peace is so much involved in questions as to the prerogative in making treaties that the two must be dealt with together. Parliament has only indirect means of bringing a war to a close, but it is hard to conceive of a peace concluded simply by a cessation of hostilities and mutual assurances of amity. Some engagements must be entered into, liabilities incurred, territory acquired or ceded, and a question arises in this form: No one but the King can bind the community by treaty, but can he always do so without the co-operation of Parliament? It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs Parliamentary sanction.<sup>3</sup> If it were not so, the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament.

Questions arise, however, in relation to this prerogative which need fuller consideration. Can the King cede territory by treaty without consent of Parliament, or can he confer immunities on foreigners, or affect the rights of private individuals except with such consent?

The cession of territory is a matter 'in regard to which the practice of consulting Parliament has varied widely from time to time':<sup>4</sup> but the tendency has been undoubtedly in the direction of obtaining the sanction of Parliament more regularly, and not merely by an address to the Crown, or a vote signifying approval, but making the treaty or convention conditional on the approval of Parliament and by the embodiment of the provisions relating to the cession in the schedule of a Statute.

<sup>1</sup> Cobbett, *Parl. Hist.* xxii. 1084, 1214.

<sup>2</sup> Morley, *Life of Gladstone*, i. 564.

<sup>3</sup> Cf. *The Bathori*, [1934] A.C. 91, which applies the principle to alteration of international law.

<sup>4</sup> Lord Percy, moving the second reading of the Anglo-French Convention Bill; *Parl. Deb.*, 4th Ser. cxxxv. 502.

In the eighteenth century the exercise by the Crown of this prerogative was unquestioned, but ministers might suffer if a mistake was made. Blackstone says:

'A king may make a treaty with a foreign state which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded.'<sup>1</sup>

The peace of 1783 involved not merely the cession of Minorca and Florida, but the surrender of the sovereignty over the American colonies to those who had, up to that time, been subjects of the Crown. No statutory sanction was obtained for these cessions, beyond an Act<sup>2</sup> which empowered the King to conclude a peace or truce with the Colonies, and for that purpose to annul or suspend any Acts of Parliament which related to those colonies. Nothing is said of surrender of sovereignty or cession of territory. In the Addresses, moved in the two Houses, of thanks to the King for the conclusion of peace with France, Spain, and the American colonies, Lord Loughborough expressed himself as convinced that the King had exceeded his prerogative by the cessions of territory involved;<sup>3</sup> but he was flatly contradicted by Lord Thurlow. No one in either House followed up the discussion on these lines, nor do the noble Lords themselves appear to have been much impressed with the force of their own arguments, which were designed for party ends.

The same sort of question was raised when the sovereignty of the Orange Free State was abandoned in 1854:<sup>4</sup> but it should be noted that the Attorney-General, Sir A. Cockburn, expressly defended the transaction on the ground that the territory in question had been acquired by conquest. He drew a distinction between a colony so acquired and one acquired by settlement, or, as he called it, 'by occupancy'. Under such circumstances

'he was aware that there existed considerable difference of opinion as to whether the Crown had the power of getting rid of those territories otherwise than by an Act of the Legislature.

<sup>1</sup> Blackstone, *Comm.* i, c. 7, p. 251.

<sup>2</sup> 22 Geo. III, c. 46.

<sup>3</sup> *Parl. Hist.* xxiii. 430.

<sup>4</sup> *Parl. Deb.*, 3rd Ser. cxxxiii. 82. It may conceivably be doubted if the Orange territory were really acquired by conquest, but the issue is academic.



On the other hand, with regard to colonies acquired by conquest and by cession, it was clear that the Crown had an undisputed and absolute sovereignty over them, and that the persons there did not acquire any right to the laws and institutions of this country.'

The cession of sovereignty to the Orange Free State took place without further question, but the limits on the prerogative in this matter have been since then from time to time considered in Parliament or discussed by eminent legal authorities. Starting from the point indicated by Sir A. Cockburn, and assuming that the King may cede territory acquired by conquest or cession, it has been maintained, with much cogency, that his powers may be limited even in the case of such territories if they have been the subject of legislation by the Imperial Parliament, or if the King, by his own act, in conferring upon them representative institutions, has put it out of his power to legislate by Order in Council. The prerogative of cession, if this view is correct, would be coextensive with the right to legislate by Order in Council.

There seems, however, to be a consensus of opinion that at the close of a war, and for the purpose of concluding a peace, the prerogative of cession is wider than it would be in time of peace.

We must look for authority to judicial decision and the practice of the State, and this practice is guided, we must presume, by the opinions of the legal advisers of the Crown.

Of judicial opinion there is but little. In 1876 a case came before the Judicial Committee of the Privy Council on appeal from the High Court of Bombay. That Court had held, for the purposes of a judgment in a particular case, that territory had been ceded, and that the Crown had no power to make such cession in time of peace without consent of Parliament. The Judicial Committee reversed the judgment of the Indian Court, and, while holding that what had taken place did not amount to a cession, expressly stated that their Lordships entertained grave doubts 'as to the soundness of the general abstract doctrine laid down' on this question of the prerogative of cession.<sup>1</sup>

This, however, was an Indian appeal, and there was a mass of precedent for cession of territory in our Indian Empire, to

<sup>1</sup> *Damodhar Gordhan v. Deoram Kanji*, 1 App. Cas. 352.

which no Parliamentary assent was given, ranging over a long period of years and reaching comparatively recent times. Power to cede was given in 1758 by Charter,<sup>1</sup> and no conclusion could safely be drawn for other parts of the dominions.

There remains the practice of the State.

In 1890 Queen Victoria, in concluding a treaty very reluctantly<sup>2</sup> with the German Emperor, which provided among other things for the cession of Heligoland to the Emperor,<sup>3</sup> was advised by her ministers to make the cession conditional on the approval of Parliament. This invitation to Parliament to share in the exercise of the prerogative rights of the Crown, and therewith to assume the responsibilities of the Executive, was much criticized in debate. The views of the Opposition were forcibly stated by Gladstone, who showed that there were precedents of cession of all kinds of colonies, conquered or settled, with or without representative institutions.

Gladstone<sup>4</sup> was doubtless right in his statement as to the facts of cession; and, while A. J. Balfour asserted that 'eminent legal authorities consulted specifically' had maintained the necessity for Parliamentary assent, Goschen admitted that the course taken by the Government was a departure from practice, and did not involve the proposition 'that the assent of Parliament is indispensable to treaty making or even to a cession of territory'.

The course taken in 1890 was followed in the case of the Anglo-French Convention in 1904, in which various points at issue between the two countries were settled on terms which involved cessions of territory to France. No question was raised in either House of Parliament, except as to the expediency of the terms, when the Bill which embodied the Convention was under discussion.

It may now be regarded as settled that cession of territory should be approved by Parliament, as in the case of the cession to Italy of Jubaland in 1927, and of the transfer of certain areas to Perak by the Dindings Agreement in 1934. This is in accord with the whole trend of relations between Parliament and the ministry, and the Labour ministry of

<sup>1</sup> Ilbert, *Government of India*, pp. 35-7.

<sup>2</sup> *Letters*, 3rd Ser. i. 611-14.

<sup>3</sup> 53 & 54 Vict. c. 32.

<sup>4</sup> *Parl. Deb.*, 3rd Ser. cccxlvii. 764.

1924 adopted the rule of submitting all treaties to Parliament before ratification, but the practice is not at present followed where the issue is within the powers of the Crown. In important questions, however, the approval of the Commons is obtained before ratification.

In support of the view that treaties of cession should be submitted to Parliament is the fact that cession of territory necessarily affects the rights and duties of the dwellers on the ceded territory. It affects their nationality either by the extinction of the State under whose sovereignty they lived, or by the transfer of that portion of the country in which they lived to another sovereign. The first case is illustrated by the transformation of the Orange Free State, an independent political society, into the Orange River Colony, a part of the King's dominions. The second by the transfer of Heligoland from England to Germany.

In the first case it is usual to allow those who would avoid their new nationality to leave the conquered State:<sup>1</sup> in the second case provision may be made by treaty or otherwise for those who desire it to retain their old nationality. But in all such cases, as it would seem, specific provision must be made if the effect of cession in changing the nationality of the dwellers on the ceded lands is to be averted.<sup>2</sup>

And the King by cession of territory can not only change the nationality of his subjects, but can affect in some respects their civil rights. Thus, if a question was in issue between an inhabitant of the ceded territory and his Government in respect to rights over land in that territory, the remedy of the inhabitant, if transferred at all, would be transferred from the old to the new sovereign.<sup>3</sup> But a demand in the nature of a money claim in tort or contract, against the old Government, even if it were a part of the public debt, could only be

<sup>1</sup> The case of a foreigner, naturalized in the conquered State, who has not lost his own nationality, can be met by permission to declare an intention to retain that nationality, to revert to his domicile of origin, and remain, a foreigner, in the conquered State. There is no definite rule of British Law on this topic. See Keith, *State Succession*, ch. vi.

<sup>2</sup> Cf. pt. i, p. 291 *ante*.

<sup>3</sup> It does not follow that they would be transferred at all; *Cook v. Sprigg*, [1899] A.C. 57.

transferred to the new Government by the terms of a treaty, or by a novation involving the action of all three parties, the two Governments and the claimant.<sup>1</sup>

The assumption by this Government of any portion of the public debt of a country acquired by cession would lay a charge, or might do so, on the subjects of this country, and a definite and well-organized limit on the treaty-making power of the Crown is found in the rule above mentioned, that where a treaty involves (1) a charge upon the people, or (2) a change in the general law of the land, it may be made, and be internationally valid, but cannot be carried into effect without the consent of Parliament.

Treaties which thus affect the rights of the King's subjects are made subject to the approval of Parliament, and are normally submitted for its approval before ratification, or ratified under condition.

Thus one reason for the legislative<sup>2</sup> effect given to the treaties of peace in 1918-24 was the interference with private rights under the clearing-house system of debt liquidation between nationals of the powers parties to the treaties.

Similarly treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods: or extradition treaties which confer on the executive a power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here,<sup>3</sup> cannot be made operative without legislation.

The right of the Crown, by treaty merely, to extend to foreigners immunities from the law of the land, which would affect the private rights of citizens, was raised in the case of the *Parlement Belge*.<sup>4</sup>

It was alleged in that case that Queen Victoria had, by convention with the King of the Belgians, conferred upon a

<sup>1</sup> See pt. i, ch. vi, § 8.

<sup>2</sup> 9 & 10 Geo. V, c. 33; 10 & 11 Geo. V, c. 6; 11 & 12 Geo. V, c. 11; 14 Geo. V, c. 7.

<sup>3</sup> Forsyth, *Cases and Opinions in Constitutional Law*, p. 369. Cf. *Californian Fig Syrup Co.'s Trade-mark, In re* (1884), 40 Ch.D. 620; *Carter Medicine Co.'s Trade-mark, In re*, [1892] 3 Ch. 472.

<sup>4</sup> 4 P. D. 129; 5 P. D. 197.

ship, assumed by the Court to be a private ship engaged in trade, the immunities of a public ship, or ship of war, so as to disentitle a British subject from proceeding against her for injuries sustained in a collision. Sir Robert Phillimore held that the treaty-making prerogative did not extend this length, and gave judgment against the ship.<sup>1</sup> His decision was reversed by the Court of Appeal,<sup>2</sup> but on a different ground, namely, that the *Parlement Belge* was a public ship, although not a ship of war, being used for a national purpose, the transmission of mails. The Court carefully abstained from expressing any opinion on the point on which Sir Robert Phillimore mainly rested his judgment.

The same question was raised, and evaded, in *Walker v. Baird*.<sup>3</sup> The working of a lobster-factory on the coast of Newfoundland was stopped by an officer entrusted with the enforcement of an agreement made between the Crown and the Government of France. The owner of the factory brought an action, and it was held to be no defence to allege that the conduct of the officer was 'an Act of State'. Whether or no it could be justified by the treaty-making power of the Crown was discussed but not settled, inasmuch as the statement of defence assumed that the mere allegation that the acts were done in pursuance of a treaty took the matter out of the cognizance of the Court. This was not the view of the Judicial Committee. It was admitted that the Crown

'could not sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the terms of a treaty.

'Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in cases akin to a treaty of peace, or whether in both or either of those cases interference with private rights can be authorized otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion.'

It is, however, clear that by according recognition to a newly formed State the King confers immunity on its ships,<sup>4</sup> and that by such recognition the confiscation of property

<sup>1</sup> (1879), 4 P. D. 154.

<sup>2</sup> (1880), 5 P. D. 197.

<sup>3</sup> [1893] A.C. 491.

<sup>4</sup> *The Gagara*, [1919] P. 95; *The Jupiter*, [1924] P. 236.

#### § 4. CONSULAR JURISDICTION

The King can 'by treaty, capitulation, grant, usage, sufferance, and other lawful means', exercise jurisdiction within divers foreign countries. The history of foreign jurisdiction of this nature begins with the Levant Company, which obtained a charter in 1581, renewed in 1606 and 1662, conferring power to appoint consuls who should administer justice between merchants 'in all places in the dominion of the Grand Seignior and in other Levant Seas'.<sup>2</sup> By capitulations (a term derived from the chapters of the treaties) made with the Ottoman Porte suits between subjects of the Crown were, throughout the territories specified in the charter, to be decided by the judges therein described, and not by the local Courts, in which religious grounds rendered impartial judgments impossible.

Usage appears to have extended this jurisdiction from cases in which both parties were British subjects, to cases in which the defendant only was a British subject, and to cases of crime committed by British subjects.

When the Levant Company ceased to exist, it became necessary to provide for the exercise of this jurisdiction otherwise than by the Company's charter, and perhaps also some doubts had arisen as to the power of the Crown to create such jurisdictions by mere exercise of the prerogative.<sup>3</sup> In 1843 began the series of Foreign Jurisdiction Acts, which are now consolidated in the Act of 1890 (53 & 54 Vict. c. 37). The purport of these Acts has been to give to the Crown full power to provide by Order in Council for the exercise of such jurisdictions, wherever 'by treaty, capitulation, grant, usage, sufferance, and other lawful means', they have been acquired or have come into existence.<sup>4</sup>

<sup>1</sup> *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.*, [1921] 3 K.B. 532.

<sup>2</sup> See Tarring, *British Consular Jurisdiction in the East*, p. 9.

<sup>3</sup> Hall, *Foreign Jurisdiction of the British Crown*, p. 9.

<sup>4</sup> For an account of the history of consular jurisdiction, and of the law (Statutes, Orders in Council, and decided cases) down to 1887, see Tarring, *Consular Jurisdiction in the East*. See also Hall, *Foreign Jurisdiction of the British Crown*, pt. iii, and for statements of the law, Jenkyns, *British Rule*

The system for a time was widely extended. But Japan secured by treaty its extinction in 1899. Siam was set free by a treaty of 1909; Turkey by the Treaty of Lausanne, 1923; and Persia compelled acquiescence in its abrogation in 1929; an effort at unilateral abrogation by China in 1931 was abortive.

Foreign jurisdictions exercised in consular courts exist at the present time in civilized independent states by virtue of express treaty, as in Abyssinia (Ethiopia), China, Kashgar, Bahrein, Kuwait, Maskat, Morocco, and Egypt. It exists also in a modified form as we have seen in Zanzibar and Tonga, protected states with a settled form of government.<sup>1</sup>

Where such a jurisdiction takes its origin from treaty, its extent and the persons over whom it may be exercised must be the matter of express agreement,<sup>2</sup> but tacit consent has in some cases extended the power, while in Egypt it is limited by the creation of the Mixed Courts. Appeal lies ultimately to the Privy Council.

It is enough here to call attention to these foreign or consular jurisdictions, and to point out the three stages by which they come into being:

(1) The treaty or rule of international law which renders their existence possible.

(2) The Statute which gives and defines the power by which the King creates them.

(3) The Order in Council by which they are in fact created, and their extent prescribed as to the law to be administered and the persons who are to be subject to it.

A necessary corollary to the power of jurisdiction is the right to prescribe regulations to be observed by persons subject to that jurisdiction, and thus to legislate for such persons in the countries in question.

*and Jurisdiction beyond the Seas* (1902), and Ilbert, *Government of India* (ed. 3), ch. v. In the case of China there is a very extensive literature, but mainly on the international aspects.

<sup>1</sup> The jurisdictions exercised in the dependent Indian states do not always originate in treaty, but are rooted in the relation of suzerain and dependent state; they are the concern of the India Office, and not of the Foreign Office, and, however analogous they may be to the matter in the text, they are not consular jurisdictions. See p. 122 *ante*.

<sup>2</sup> The subject of foreign jurisdiction was treated exhaustively by Hall, *Foreign Jurisdiction of the British Crown*, but that work (1894), of course, is now out of date.

## CHAPTER IX

### THE REVENUES OF THE CROWN AND THEIR EXPENDITURE

#### I. THE REVENUE<sup>1</sup>

THE revenues of the Crown are not, as the term would seem to imply, an income which the King receives to spend at his pleasure. Here as elsewhere in our Constitution the identification of the Crown as the individual Sovereign with the Crown as the executive government has produced a misleading terminology. The so-called revenues of the Crown are for the most part the sums paid, in various forms, by the people for the maintenance or promotion of the various objects for which the Government exists. The ancient hereditary revenues of the Crown are thrown into the common stock for this purpose. Out of this common stock a sum bearing a very small proportion to the whole, £110,000 out of about £725,000,000, is assigned to the King and Queen to be used at their discretion. The rest goes to satisfy those national objects which cannot be satisfied except by money payments, and is appropriated precisely to these several objects of Parliament, annually in the Appropriation Act, or once for all by permanent Statute.

The description of the great branches of the revenue in the annual statement of national income and expenditure furnished to Parliament affords the nomenclature followed in the earlier part of this chapter. The taxes are not arranged in their historical order, nor, in the case of the Excise and Stamp duties, do the terms explain the nature of the taxation involved. But the terms constitute the authorized version, and it is safer to adopt them as they stand.

Some of these sources of revenue have a long and interesting history; some are modern. The Customs and the taxes on land and property are associated, though not in their present form, with the great constitutional struggles of the four-

<sup>1</sup> The main authorities for this section, apart from the Statute Book, are Stubbs's *Constitutional History*, Dowell's *History of Taxation*, and the Public Income and Expenditure Return of 1869 (366).



teenth and seventeenth centuries. The Crown lands take us back to Saxon times. The Excise and the Post Office mark the beginning of a new financial system under Charles II. The Stamp duties and the Estate duties represent the ingenuity of modern finance.

The sources of revenue are thus arranged:

*Year Ending March 31, 1935*

ORDINARY REVENUE:

*Inland Revenue:*

	£
Income tax . . . . .	228,877,000
Surtax . . . . .	51,165,000
Estate, &c., Duties . . . . .	81,356,000
Stamps . . . . .	24,110,000
Excess Profits Duty and Corporation Profits Tax . . . . .	2,300,000
Land Tax and Mineral Rights Duty . . . . .	770,000
Total . . . . .	388,578,000

*Customs and Excise:*

Customs . . . . .	185,096,000
Excise . . . . .	104,600,000
Total . . . . .	289,696,000

Motor Vehicle Duties (Exchequer share) . . . . .	5,100,000
Post Office (net receipt) . . . . .	12,250,000
Crown Lands . . . . .	1,320,000
Receipts from Sundry Loans . . . . .	4,372,209
Miscellaneous Receipts . . . . .	15,124,841

Total ordinary revenue . 716,441,050

SELF-BALANCING REVENUE:

Post Office . . . . .	61,750,000
Motor Vehicle Duties apportioned to Road Fund . . . . .	26,438,000
Total Self-balancing Revenue . . . . .	88,188,000
Total . . . . .	804,629,050

## § 1. THE CUSTOMS

The liability of imported or exported articles to a charge levied by the King is of very ancient date. The charge seems, in its origin, to have been a repayment to the King for cost incurred in maintaining the ports and keeping the sea clear of pirates. That it was increased in order to enrich the Crown seems plain from the words of Magna Carta wherein the King promises that he will not levy evil tolls upon

merchants. A prise or prisage upon imported wine, duties on imported woad,<sup>1</sup> fish, and salt, and an export duty upon wool and leather, appear to have been recognized at the end of the twelfth and throughout the thirteenth century.

In 1275 there was granted to Edward I, in substitution for the indefinite 'ancient and rightful customs' of the Charter, an export duty of half a mark or 6s. 8d. on every sack of wool, and on every 300 woolfells, and a mark on every last of leather. These duties were excepted by the King in the *Confirmatio Cartarum* (1297) from the renunciation therein made of his right to levy tolls on merchandise. They were henceforth known as the *antiqua custuma*.

The *nova custuma*, first imposed by Edward I in 1303, and confirmed after some vicissitudes in the Statute of Staples in 1353,<sup>2</sup> had a different origin, and ostensibly a different incidence, since it was a charge upon foreign merchants. It was a charge of 10s. on the sack of wool and on every 300 woolfells exported by alien buyers, and of 3d. in the pound on all goods imported. The *antiqua custuma* and the *nova custuma*, together with the Prisage and Butlerage upon wines imported by English and foreign merchants, remained a part of the hereditary revenues of the Crown until the two customs duties were absorbed in the grants of tunnage and poundage made to the Crown at the commencement of each reign. Prisage and Butlerage were excepted from the consolidation of the customs duties at the beginning of the reign of Charles II; their proceeds were granted by the Crown to subjects, and they were commuted in 1803 for annuities charged on the Consolidated Fund, and payable to the persons entitled to exact the charge at the ports of England and Wales.

A grant of Tunnage and Poundage meant a duty on exports and imports distinguished from the above-mentioned duties by the name of Subsidy. We must be careful to bear in mind the two senses in which this term is used as applied to direct, and to indirect taxation; in both it means a specific Parliamentary grant as opposed to the hereditary revenues of the Crown, but in the department of direct taxation 'subsidy' has a technical meaning to be explained hereafter. The subsidy of Tunnage and Poundage is kept apart as an item of

<sup>1</sup> Madox, *Exchequer*, xviii, § 4.

<sup>2</sup> 27 Ed. III, st. 2.

revenue from the ancient and from the new or small customs, and the controversies to which it gave rise had a different history.

Throughout the greater part of the fourteenth century the King claimed the right to levy a toll upon exported wool, woolfells, or leather, over and above the customs above mentioned, and to make separate agreements with merchants for a payment on the tun of imported wine, and the pound of imported goods. This right was never admitted by Parliament, and at last, in 1371, it seemed as though the controversy was closed.

The settlement as to impost on wool was embodied in a Statute whereby the King was precluded from taking more than the ancient customs without consent of Parliament. In the matter of Tunnage and Poundage, Parliament seems to have thought that it had done enough in making an express grant in 1373 of 2s. on the tun of wine, and 6d. on the pound of exported and imported goods, except wool and skins. The King was not expressly precluded from raising these rates, and the door was thus left open for an arbitrary increase in the royal revenues. The advantage taken of this opening by the Tudor queens and James I is commemorated in the arguments in *Bates's Case*.<sup>1</sup>

But from 1376 down to the resettlement of the Revenue at the Restoration, tunnage and poundage at various rates was granted either for a term of years or for the life of the King, and what we now call by the general term customs, appears to fall under three heads.

- (1) The ancient customs, together with prisage and butlerage.
- (2) The subsidy on exported wool.
- (3) The duty, at a rate fixed by Parliament, on the tun of imported wine, and the pound of imported or exported goods.

These last two Parliament was careful to keep in its hands; the subsidy by the provisions of the Act of 1371,<sup>2</sup> tunnage and poundage by the terminable nature of the grant. But this was an insufficient security. The Tudor queens laid fresh imposts on cloth and sweet wines without consulting Parlia-

<sup>1</sup> (1606), 2 St. Tr. 371.

<sup>2</sup> 45 Ed. III, c. 4.

ment; and in Mary's reign the rating of merchandise upon the value sworn to by the merchant was abandoned, and the values at which goods of different sorts should be rated was set forth in a Book of Rates.<sup>1</sup>

James I increased by an act of prerogative the statutory poundage upon certain articles of commerce and modified the Book of Rates after consultation with the chief merchants, and without reference to Parliament. The resistance of Bates to the payment of the added duty on currants, the decision of the Court of Exchequer in favour of the Crown, the exhaustive discussion in the House of Commons in 1610, and the final limitation of the royal prerogative in this respect by the Long Parliament, are matters dealt with elsewhere.<sup>2</sup>

In 1660 the customs were consolidated, and the rates at which commodities should be charged were classified in the Statute which granted this portion of the revenue to the Crown. The old distinctions of ancient and new customs, subsidies and imposts, were wiped out, and rates were classified under four heads:

- (1) The tunnage on wine.
- (2) The poundage on imported goods.
- (3) The poundage on exported goods.
- (4) The duty on woollen cloth.<sup>3</sup>

These were granted to Charles II for life, and in like manner to James II.

New duties were imposed in the reign of William and Mary, and in 1698 an increased percentage was charged upon the articles specified in the Act of 1660, under the title of the New Subsidy. Further percentages were charged during the war of the Spanish succession in 1703 and 1704, during the war of the Austrian succession in 1747, and during the Seven Years War in 1759: but the export duty on woollen manufactures was repealed in 1700.

Thus our revenue laws had become extremely complex when a fresh consolidation of customs was carried into effect by Pitt in 1787.<sup>4</sup> Hitherto the complication of the customs duties had extended not only to their collection but to their

<sup>1</sup> Dowell, *History of Taxation*, i. 165.

<sup>2</sup> Vol. i: *Parliament*, pp. 356-9.

<sup>3</sup> 12 Car. II, c. 4.

<sup>4</sup> 27 Geo. III, c. 13, s. 52.

expenditure: the usual practice of the legislature was to appropriate each duty, when imposed, to a specific service, and thus it came about that, while some few duties were left unappropriated and could be used by Parliament for any service of the year, others were assigned, as they came in, to funds made up from various sources and devoted to some public purpose, while others again went directly to meet specified charges.<sup>1</sup> The Commissioners of Public Accounts<sup>2</sup> recommended that the customs should be simplified; the entire revenue thence arising was henceforth paid into one Fund, called the Consolidated Fund.

Since 1787 new tariffs have been enacted, and new consolidation Acts passed. The principles on which up to 1931 financial policy was based were mainly two. One was to simplify and cheapen the collection of revenue by reducing the number of commodities on which duties were levied; the other was to afford encouragement to the manufacturing interest by exempting, if possible, from taxation all raw materials imported into the United Kingdom for purpose of manufacture. Sir Robert Peel worked hard in this direction; when he came into office in 1842, the customs affected 1,200 articles, in 1845 alone he struck 450 articles off the list, and the process went rapidly forward. In 1846 the principle of free trade was adopted, and the system of colonial preference went with it, fiscal autonomy being in consequence necessarily conceded to the self-governing colonies, definitely from 1859.<sup>3</sup>

The South African War (1899-1902) necessitated the imposition of fresh duties, including a small duty on corn, and out of this rose the propaganda of Joseph Chamberlain for a system of colonial preference and modified protection.<sup>4</sup> The campaign failed for the moment to effect its aim, and the Liberal Government was supported in 1906 by a great majority for free trade. Under the stress of war conditions, however, the principles of preference within the Empire and moderate protection for certain home industries were con-

<sup>1</sup> Thirteenth Report of the Commissioners of Public Accounts, p. 51.

<sup>2</sup> Appointed under 20 Geo. III, c. 54.

<sup>3</sup> Keith, *Responsible Government in the Dominions*, ii. 854 f.

<sup>4</sup> For Edward VII's attitude, see Lee, ii. 173-6.

ceded. But the suggestion of a general system of protection was defeated at the general election of 1923, and it was only possible during the tenure of office of the Conservative Government from 1924 to 1929 to arrange for the safeguarding of a limited number of industries. Conversion of the electorate to protection proper was, however, achieved in 1931 as a result of the financial crisis of that year. From the passing of the Import Duties Act, 1932,<sup>1</sup> the country has been committed to the principle of a general tariff, with Imperial preference and power of bargaining. In addition to this the plans of aiding agriculture under the Agriculture Marketing Acts, 1931<sup>2</sup> and 1933,<sup>3</sup> render it necessary to exercise in aid of the home producers of agricultural products the power of limiting imports from overseas either by increased tariffs, or by quotas.

Internationally the new policy has involved a large mass of treaty negotiation for the development of mutual trade. It has involved among other things tariff reprisals on France, for breach of most-favoured-national treatment, and induced the French Government to terminate the treaties of 1826 and 1882 granting that treatment. Constitutionally it has involved efforts to put into experienced and competent hands the duty of recommending tariff changes in the interests of British manufacturers and producers. An Import Duties Advisory Committee is appointed by the Treasury,<sup>4</sup> consisting of not more than six—at present three members—which must receive applications for imposition or removal of duties, the general principle being that there is on all imports a duty of 10 per cent. *ad valorem*, and that in certain cases there may be no duty, in others additional duties may be charged. The Treasury may act on the advice of this body and impose duties not exceeding those recommended. Similarly the Board of Trade<sup>5</sup> is authorized with the concurrence of the Treasury to impose discriminatory duties against the produce or manufacture of any foreign country which discriminates by imposing additional duties or limiting imports or otherwise against British produce or manufactures. The control of

<sup>1</sup> 22 Geo. V, c. 8.

<sup>2</sup> 23 & 24 Geo. V, c. 31.

<sup>3</sup> Ibid. s. 13.

<sup>4</sup> 21 & 22 Geo. V, c. 42.

<sup>5</sup> 22 Geo. V, c. 8, ss. 2, 3.

Parliament is assured by the rules<sup>1</sup> that any Order shall cease to have effect if it imposes a duty unless it is confirmed by the House of Commons within twenty-eight days, and that any other Order may be annulled. The Treasury is also authorized to impose extra duties on imports from the Irish Free State in order to make good the failures of the Government of the State to carry out its obligations towards the United Kingdom under its financial agreements.<sup>2</sup>

All these powers have been exercised without much criticism, for it is generally admitted in Parliament that it would be impossible for the Government to make itself responsible for decisions on import duties in general without expert advice, and that such a body as the Committee serves a necessary purpose in this regard. In the other matters it would frequently be unwise to permit action to be delayed until Parliament had been induced to act, and full control is reserved to Parliament by the necessity of an affirmative resolution for the continued collection of any fresh duties imposed.

## § 2. THE EXCISE

Duties on articles of consumption produced at home were first introduced under the Commonwealth. After some murmuring at the novelty of the tax, and at its incidence upon things of daily use, it was accepted as both productive and fair. The duties at that time extended not only to articles produced at home, but to certain articles imported from abroad, which were thus taxed twice over, first at the ports in accordance with the Book of Rates, and again while in the hands of the merchant on their way to the consumer.

When the revenue was settled on the Restoration of Charles II, it was necessary to provide the King with a source of income which should meet the loss occasioned by the abolition of military tenures.

It was impossible to devise a tax which, without unfairness to individuals, should fall upon the lands heretofore held in chivalry.

An excise duty on beer and other liquors, although it did not correspond either in character or incidence to the source

<sup>1</sup> Ibid. s. 19.

<sup>2</sup> 22 & 23 Geo. V, c. 30.

of revenue which was abandoned, seemed to the landowners, who controlled Parliament in their own interests, to be a just and reasonable method of raising money: it was one to which the taxpayer had become accustomed in the days of the Commonwealth. An excise duty was therefore imposed by 12 Car. II, c. 24, and was made a part of the hereditary revenues of the Crown. A duty similar in character and amount was imposed at the same time and granted to the Crown for life.

But after the Revolution the King was no longer entrusted with the maintenance of all the services of the country. He was then granted only such a sum as would suffice to maintain the Civil List; and the hereditary excise, with the other hereditary revenues, diminished *pro tanto* the need of a supplementary grant from Parliament to make up the amount at which the annual cost of the Civil Service was estimated. At the commencement of Anne's reign, the right of the Crown to alienate the hereditary revenues was limited by the Statute which granted a Civil List to the Queen.<sup>1</sup>

In 1736 a portion of this income was commuted by Parliament for an annual payment to the Crown of £70,000. In 1787 by the Consolidated Fund Act, already referred to, all existing excise duties were repealed, and therewith the hereditary excise. New duties were imposed of a similar character, and their produce carried to the Consolidated Fund, but a calculation was made every year of the amount which the hereditary excise would have produced.

Without going into the detail of the Statutes on the subject, it is enough to say that, although each successive sovereign since George III has surrendered his right to the hereditary revenues in consideration of a fixed annual payment, the hereditary rights of the Crown are kept alive, while provision is made that the income of which they are the subject should, as in the case of Crown lands, go to the Consolidated Fund, or, as in the case of the hereditary excise, should not be raised at all.<sup>2</sup>

<sup>1</sup> 1 Anne, st. i, c. 7, ss. 3, 7.

<sup>2</sup> These duties on ale, beer, and cider, were dealt with by 11 Geo. IV and 1 Will. IV, c. 51, but in the Civil List Act of William IV the hereditary rights in question were surrendered to the public, with a provision, repeated



The articles on which excise duties are now levied are not numerous, but include beer and spirits which, together, produce more than an eighth of the national revenue. But the term has been extended beyond its original meaning of a tax upon articles of use or consumption produced at home.

The term was used to excite popular feeling against a very useful measure, the celebrated Excise Bill of Sir Robert Walpole. His scheme was nothing more than a mode of collecting as in the case of tea, coffee, and cocoa, the customs on wine and tobacco; part on unshipment when the goods were warehoused, part on being taken out for home consumption. The latter part was to be collected by the officers of Excise. This term, which had reference solely to the mode of collection, was used by the leaders of an unscrupulous opposition as describing the character of the tax. The clamour raised determined Walpole to withdraw a measure, the only fault of which was that it was called by an unpopular name.

But the modern use of the term Excise is largely extended beyond its original meaning. The tax does not include customs duties in any form: so far as it falls on commodities, it falls on commodities made or prepared in the United Kingdom. But under the head of Excise appears a great variety of licences, for the grant of which money has to be paid to the Inland Revenue. Some of these licences are licences to sell commodities or to carry on a trade such as dealing in beer and spirits, pawn-broking, distilling, selling tobacco, acting as house agent: the bulk of them are known as Establishment licences, and were formerly known as Assessed Taxes. They are in fact demands made by the State upon the citizen to pay for enjoyment of certain things of convenience or luxury, on the assumption that such enjoyment represents wealth which should thus be called upon indirectly to contribute to public needs. To employ a male servant, to keep a dog or a carriage, to shoot game, to use armorial bearings, may be taken to show that one who can afford these ornaments or comforts is able to assist the revenue. Even necessities such as patent medicines yield their quota. Before 1869 the

in 1 & 2 Vict. c. 2, that if the successor to the throne should so desire they should revive. This has not been done; see Civil List Act, 1901, s. 9 (3), Civil List Act, 1910, s. 9 (3).

system was to make the taxpayer pay for what he had enjoyed in the preceding year. In 1869 the Assessed Taxes were abolished *eo nomine*.<sup>1</sup> The taxpayer is now required to take out a licence for his existing establishment at the commencement of each year, and additional licences as the year goes on if his establishment should be increased.

### § 3. ESTATE DUTY

This is a general term for duties levied on property in course of devolution, and these are often described as the death duties. They include (1) a charge on the whole estate of a deceased person, real and personal, and this is the Estate duty strictly speaking, (2) succession duty to realty and personalty, and (3) legacy duty payable in respect of bequests of personalty.<sup>2</sup>

### § 4. STAMPS

A stamp duty is a convenient mode of levying a tax upon property in course of devolution, just as a licence is a convenient mode of taxing property the existence of which is indicated by the use of luxuries.

The two modes of taxation cannot fail to overlap. Whether a receipt for a tax imposed by the legislature is given in the form of a stamp or a licence must in many cases be immaterial. It would seem to be of no great importance whether the receipt for the *ad valorem* duty levied on the estate of a dead man is in the form of a licence to take out probate of the will, or a stamp affixed to an inventory of the dead man's estate. Nor would it matter that instead of a licence to keep a dog or kill game a stamped receipt for the money required to be paid was given to the payer. In fact, the distinction between stamp duties and other modes of taxing is not a difference in kind. It does not affect the incidence of taxation, but only the mode of collection. A certain amount of the money paid by the taxpayer must always go to the cost of collecting it, and it is the business of Government to diminish as far as possible the cost of collection. There are certain transactions which represent transfers of credit, or creations of liability

<sup>1</sup> 32 & 33 Vict. c. 14, pt. v.

<sup>2</sup> For a summary see Ridges, *Const. Law of England* (ed. Keith, 1934), pp. 397-9.

which it would be difficult to tax otherwise than by requiring a stamp for their validity. But, where the legislature demands from the heir a tax bearing a certain proportion to the property which he acquires by succession, the arrangement that the stamp affixed to the receipt of the money should indicate the amount paid, is merely a matter of convenience in collecting the revenue.

The stamp duties must now be regarded as distinct from the death duties; these, though a stamp is made the means of collection, are in effect a tax on real and personal property in the course of devolution; while the stamp duties proper are levied upon a miscellaneous set of legal transactions which need a stamp for the validity.

The first general Stamp Act was passed in 1694, when commissioners were appointed to prepare the stamps and collect the revenue thence arising. The value of the stamps ranged from £2 to 1*l.*, and the documents requiring to be stamped were forms of admission to offices or degrees, marriage certificates, certain writs, affidavits, copies of wills, pleadings and depositions, probates of wills and letters of administration, documents under seal, and contracts not under seal.<sup>1</sup>

These duties were increased from time to time, and additions were made to the documents which required stamps for their validity. Its automatic operation was the cause of its selection in the Stamp Act, 1765, to raise a colonial revenue for the part payment of the cost of defence. Bills of exchange and promissory notes were brought within the Stamp Acts in 1782, ordinary receipts, for money paid, in 1784. The principle of taxing documents not according to their length, but according to the value of the transaction which they embodied, was of very gradual application. Introduced at first in the case of grants to offices in 1714, it was applied to receipts when they were first taxed in 1784, was extended to bonds in 1797, to mortgages in 1804, to conveyances by way of sale in 1808, to settlements in 1815.

In 1853 the application of the *ad valorem* principle to receipt stamps having proved onerous in practice, was abandoned, and a penny stamp made necessary for all sums of £2 or upwards; war exigencies caused the increase to two-

<sup>1</sup> 5 & 6 Will. & Mary, c. 21.

pence. In 1881 the stamp so required was made uniform with the postage stamp, the Post Office handing over in each year to the Inland Revenue Department its share of the produce of the stamp.

### § 5. TAXES

The early history of taxation in this country is difficult to disconnect from the history of the hereditary revenues of the Crown, for the earliest contributions of the country to the maintenance of a Court, and to the needs of self-defence, seem to have grown into matters of hereditary right, and then dwindled until it became necessary to find fresh sources of revenue. Kings were apt to treat these contributions either as Crown property, or as sources which might be drawn upon at will. The nation desired to define precisely the revenues which might be regarded as Crown property, to require the King to 'live of his own'; if more was required, to apply to the Commune Concilium Regni, or later to Parliament, for a grant in aid of his revenues; and to apply the money so granted to the purpose for which it was intended.

The Saxon king conducted the business of the country with funds provided from the income of the royal estates and from his rights over other land, including the produce of the *feorm fultum* due to him for the maintenance of his Court, sometimes rendered in kind, but more usually commuted for money. To this must be added a tax which the Danish invasions made necessary for the defence of the country, the Danegeld, a charge of 2s. on every hide of cultivated land, and a growing revenue from fines levied on offenders.

Under the Norman kings the royal estates and the rest of the land became alike the property of the Crown, the *terra regis*: the King as supreme landlord enjoyed the proceeds of feudalism, reliefs, aids, and the incidents due on military tenures and had command of the income thence arising. He retained the *ferm* of the shire, which now took the form of a composition for royal dues. The Sheriff became responsible for the collection of this sum in each shire, and for its payment into the Exchequer,<sup>1</sup> together with fines due on the growing list of Pleas of the Crown. The Conqueror increased

<sup>1</sup> Stubbs, *Const. Hist.* i. 380, 383.

the Danegeld from 2s. to 6s. on the hide, and required an analogous payment from the towns.

In the reigns of Henry II and his sons new forms of taxation arise. The *ferm* of the shire and the Danegeld had long been compounded for by the Sheriff at a fixed sum. They now disappear, except where some items remain among the hereditary revenues of the Crown. The taxation of Henry II, apart from these sources of revenue, was of three kinds, one falling exclusively upon the holders of land in chivalry, another upon all holders of land, a third upon all holders of property of any sort.

The first of these was the scutage, or composition for military service, at the rate of 20s. for each knight's fee.

The second was a substitute for the earlier Danegeld. Under the various names of *donum*, *auxilium*, or carucage, it fell upon all land, and was computed by the hide, or later by the carucate of 100 acres. Where a payment of this nature was demanded by the King, the towns did not escape:<sup>1</sup> those which had bought immunity from the jurisdiction and assessment of the shire paid a fixed composition;<sup>2</sup> others compounded on each occasion with the officers of the Crown.<sup>3</sup> These are the two forms of taxation referred to in Magna Carta, where the King promises to levy no scutage or aid, other than the three feudal aids, save with the assent of the Commune Concilium.

The third form of taxation fell upon all owners of rent or chattels. It was a tax of a tenth or some other proportionate part of such property. It first appears in the Saladin tithe, but, as the country became wealthier, personal property became a more fruitful subject for taxation, and in the thirteenth, fourteenth, and fifteenth centuries the tenth and fifteenth, which had become the common form of charge on town and shire respectively, became the usual mode by which the representatives of the Commons in Parliament met the needs of the Executive as represented by the Crown.

Before going further into modes of taxing real and personal property, let us note at once the statutory limitations on the powers of the Crown to levy taxes of this sort without consent of Parliament. A tax on movables would not be included

<sup>1</sup> Stubbs, *Const. Hist.* i. 580, 584.

<sup>2</sup> *Ibid.* 584, 625.

<sup>3</sup> *Ibid.* 585.

under the term scutage or aid used in the Charter, but Parliament in its earliest days was prompt to close this door to royal acquisitiveness. The *Confirmatio Cartarum* dealt with *aids, tasks, and prises* generally, and contained a promise by the King that such charges should not be made 'but by the common assent of the realm'.

The demesnes of the Crown still offered a wide field for arbitrary taxation, especially the towns in demesne. They were, in fact, the debatable ground between hereditary revenue and parliamentary grant. But after some years of royal exaction and parliamentary remonstrance a Statute of 1340 provided against the nation 'being charged or grieved to make any common aid, or to sustain charge, except by common assent in Parliament'.<sup>1</sup> The year 1332 was the last in which the King tallaged his demesnes.<sup>2</sup>

The forced loans and benevolences of the sixteenth century, which were at times approved and converted into grants by Parliament, and the violent and illegal taxation of James I and Charles I, were met by the Petition of Right, 1628, which was conclusive against the legality of direct taxation in any form without consent of Parliament. The Bill of Rights, 1689, declares in general terms the unlawfulness of levying money 'for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament'.

To return to the forms of taxation. The old taxes, the scutage and the aid cease in or about the middle of the fourteenth century; their place is taken by taxes on movables, and the customs duties already mentioned. The taxes on movables assume the form of a fifteenth from the shire and a tenth from the borough,<sup>3</sup> the fifteenth and tenth being reached by an assessment by commissioners of cattle and crops, of chattels and stock-in-trade. But in 1334 a calculation was made by which the grant was estimated to produce £39,000, and henceforth the grant of a tenth and fifteenth meant a grant of £39,000 divided in certain proportions among the shires and boroughs. The form of the grant pro-

<sup>1</sup> 14 Ed. III, st. 2, c. 1.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 520.

<sup>3</sup> Borough meant parliamentary borough: this was one cause of the reluctance of boroughs to be represented in Parliament.

vided for an assessment of movables which, as a matter of fact, never took place.

As the property on which the tax was supposed to be levied was never re-valued after the middle of the fourteenth century, the tenth and fifteenth became in process of time an unfair tax. It lingered on as an occasional mode of raising money into the seventeenth century, and the last grant of this kind was made in 1623. Its place was taken in the sixteenth and seventeenth centuries by the subsidy. Subsidy in this sense must be distinguished from the subsidy which meant those export and import duties which were called tunnage and poundage, and from the more general use of the term to mean a grant in aid of the ordinary revenues of the Crown. The subsidy of the sixteenth and seventeenth centuries meant a charge of 2s. 8d. in the pound on movables and 4s. in the pound on land.<sup>1</sup> A grant of an entire subsidy meant this, and several subsidies were sometimes granted at one time. Except during the Commonwealth this was the ordinary form of taxation until 1663, the clergy taxing themselves apart, though after 1533 the separate subsidies granted by the clergy were required to be submitted for confirmation to the Crown in Parliament. In 1664, by verbal agreement between Clarendon and Sheldon, the clergy gave up the practice of taxing themselves apart from the laity; at the same time taxation by subsidy was abandoned. The assessment of the taxable property seems to have been conducted with such unfairness or so little care that the poor man paid as much as the rich; and in 1663, when clergy and laity granted each four subsidies, the total amount produced was no more than £282,000.

After the year 1663 we hear no more of the subsidy as a mode of raising money. The ministers of Charles II had recourse to three other forms of direct taxation.

The first of these was a poll-tax, a charge of so much per head on each individual above sixteen years of age. The tax had been employed from time to time from 1377 onwards. It was never popular, and was imposed for the last time in 1698, expiring in 1706.

The second was hearth-money, a tax on all houses but

<sup>1</sup> Dowell, vol. i, p. 194. But the amounts varied from time to time.

cottages at a rate of 2s. for every hearth or stove. This was imposed in 1662: like the poll-tax it was 'grievous to the people', and was repealed in 1689.

The third was the raising of a fixed sum divided among towns and counties, for every month, by an assessment of the value of all real and personal property in the places on which the contribution was levied. The practice began during the Commonwealth, and was adopted after the Restoration as a more effectual means of raising money than the subsidy. Though more productive than the subsidy, it was not a great success. The largest amount raised was rather more than a million and a half in the year, but complaint was made that personal property did not bear its fair share of the burden, and the practice ceased after 1691.

Personal property proved no less elusive to the revenue when, in the following year, the last attempt was made to lay a fixed and permanent charge upon all property, real and personal. The so-called Land Tax of 1692 was, in effect, a subsidy at the rate of 4s. in the pound on real estate, offices, and personal property. The amount produced by this tax diminished year by year, till in 1697 Parliament gave up all hope of obtaining a fair return for the rate voted, fixed the sum that a rate of 1s. in the pound ought to produce, and apportioned the money to be raised among the towns and counties of the kingdom. Personal property and offices were to be rated as well as land, but since it was provided that the land should be liable for what the other sorts of property did not produce, the charge in the end fell wholly upon land.

The tax fluctuated between 1s. and 4s. in the pound for just 100 years; its reduction to 3s. by the landowning interests in Parliament in 1767 formed the excuse for the Townshend duties on the colonies which undid the good done by the repeal in 1766 of the Stamp Act. In 1798 it was made perpetual by Pitt at the rate of 4s. in the pound. It thus became a permanent charge on the land in the proportion fixed by the assessment of 1692, and provision was made for its redemption by persons interested in the land on which it fell. The charge upon personalty, which had always been evaded, was dealt with as a separate tax annually granted. It does not seem to have come to more than £150,000, and was



repealed in 1833. The tax on offices and their profits, after undergoing various modifications, was repealed in 1876.

The land tax, or so much as is unredeemed, remains a source of revenue, and a survival of a mode of taxing which depended for its efficiency upon a constant revaluation of the real and personal property of the country, just as did the older taxes, the tenth and fifteenth, and the subsidy. Such a re-valuation was never carried out, and every one of these taxes in turn became a fixed charge apportioned among towns and counties. The modern attempts to tax property begin with the Assessed Taxes of 1797, and taxation has taken the following forms.

(1) The first is a tax on income, whether derived from property in land, capital invested in business, skill, or learning exercised in a profession. (2) The second is a charge on inhabited houses, which, with various changes, was levied from 1778, until the Finance Act, 1924, abolished it. (3) The third is a tax on property in the course of devolution from the dead to the living, falling on real and personal property, whether acquired by inheritance or disposition. Estate duty, legacy duty, and succession duty, now known collectively as the death duties, are in effect stamp duties. (4) The fourth is a charge on apparent wealth, indicated by the use of certain articles of enjoyment: the taxes of this nature were until lately grouped under the head of Assessed Taxes, and are now collected in the form of excise licences. Only the first of the forms properly falls under the head of taxes.

The income and property tax was first imposed by Pitt in 1799. It was then a graduated tax on incomes of from £60 to £200 a year, and a tax of 10 per cent. on all incomes above £100. It was dropped in 1802, revived in 1803 at the rate of 5 per cent. on all incomes of £150 and upwards, and was increased from time to time until its repeal in 1815. The tax was revived again by Sir Robert Peel in 1842, at the rate of 7*d.* in the pound, and has continued in existence at varying rates ever since. It falls upon incomes the sources of which are classified as (1) rents and profits arising from property in land, (2) profits arising from the use or occupation of land, (3) investments in the public debt or liability of our own country, its dominions, or any foreign state, (4) the exercise

of a profession, trade, or other occupation, (5) employment by the State, or in any corporation or company.

It is supplemented by a surtax levied progressively on all income over £2,000 a year. There is a lower limit of income (now £100) below which no tax is levied; allowances are made for wife and children and other dependants, and earned income is allowed an abatement of 20 per cent.

## § 6. POST OFFICE AND TELEGRAPH SERVICE

The Post Office as a source of revenue dates from the reign of Charles II, though James I deserves the credit of having started a post office to foreign countries for the convenience of English merchants, and Charles I, in 1635, made arrangements for the transmission of letters in England and Scotland, fixing the rates of postage by royal proclamation. The business was entrusted to a Postmaster, who took the risks and profits of the undertaking. In 1660 the Post Office was organized and privileged by Statute,<sup>1</sup> and its proceeds made part of the hereditary revenues of the Crown, and in 1663 its revenues were settled in perpetuity on the Duke of York.<sup>2</sup> In 1685 they were again settled on James II as *king*, his heirs and successors. In 1710 the Post Office was again remodelled, its powers were given validity throughout the Empire, raising in Virginia constitutional objections, and an appropriation of its income made between the civil list and the public service. Since 1760 the hereditary revenues thence arising have been merged in the general revenue, under the Civil List Acts, and since 1787 have been paid into the Consolidated Fund.

The extent of postal operations has varied much at different times. The Post Office began, in the reign of James I, as a means of communication for English merchants trading in foreign countries; it continued to undertake foreign postage throughout a great part of the wars of the reign of Anne, conveying not only letters but articles of a very varied sort.<sup>3</sup>

<sup>1</sup> 12 Car. II, c. 35.

<sup>2</sup> 15 Car. II, c. 14.

<sup>3</sup> The following are examples of these consignments:

Fifteen couple of hounds going to the King of the Romans with a free pass.

Dr. Crichton carrying with him a cow and divers other necessaries.

A box of medicines for my Lord Galway in Portugal.

Two servant maids going as laundresses to my Lord Ambassador

In 1710 its operations were contracted and systematized. A Post Office was provided for Great Britain, Ireland, and the Colonies, and a Postmaster-General appointed to superintend the whole, the office having previously been carried on by one or more persons under the superintendence of a Secretary of State.

The extension of the operations of the Post Office is a part of our social and economical history. The department undertakes upon certain terms to convey by post letters, newspapers, books, parcels, and patterns or samples; it transmits communications by telegram, by radiogram, and telephone (since 1911); it transmits cash by means of money orders and postal orders; it receives and takes care of small and large savings, and has thus a banking establishment which is responsible for more than £300,000,000; it acts as an office for the purchase of annuities within the limits of £1 and £100, for investments in Government stock, pays out old age pensions, sells health insurance stamps, issues dog licences and licences for radio reception, &c.

Treasury control of the Post Office has been close, but in 1933 it was agreed to fix at £10,750,000 the annual contribution to the revenue, any surplus after forming a reserve of £250,000 being used to extend services or meet costs of staff, &c. Effect was given to this agreement in the Finance Act of 1933, and far-reaching improvements in services, especially by air mail, have been arranged.

The exclusive privileges of the Postmaster-General as regards the conveyance of letters rest on 1 Vict. c. 33, s. 2, re-enacted in the Post Office Act, 1908; as regards the transmission of messages by telegraph,<sup>1</sup> on 32 & 33 Vict. c. 73, s. 4.

Broadcasting is carried on, since 1 Jan. 1927, under licence from the Postmaster-General, by the British Broadcasting Corporation, a chartered body, which is permitted a wide discretion in its actions. But, in view of the political importance of the power to transmit news it is provided that the

Methuen.—See Return on Public Income and Expenditure, 1869, *Parl. Pap.*, 1868–9 (366), pt. ii, p. 428.

<sup>1</sup> The Telegraph Act of 1863 defines a telegraph as 'a wire used for the purpose of telegraphic communication', and this definition has been held to include a telephone; *Attorney-General v. Edison Telephone Co.* (1881), 6 Q.B.D. 248. Cf. *Radio Communication in Canada, In re*, [1932] A.C. 304.

Corporation must broadcast matter if requested to do so by a government department, and that in a national emergency the Government may assume full control of the service, thus securing the power to supply information to the public, even if the supply of newspapers should be interfered with.<sup>1</sup>

#### § 7. THE ROAD FUND AND THE UNEMPLOYMENT INSURANCE FUND

The Post Office under the new arrangements presents a contrast to the normal system of finance. A much more serious and less desirable contrast is afforded by the Road Fund. It was created under the Roads Act, 1920,<sup>2</sup> in order to provide the means for the systematic development of roads, and to it were assigned the proceeds of the taxation on mechanically propelled vehicles imposed by the Finance Act, 1920. These taxes, as subsequently varied, are locally collected and paid to the Exchequer which, subject to a relatively slight deduction, was bound to pay them to the Road Fund Account. The taxation has justly been criticized as offending against the principle of economy and equality of taxation.<sup>3</sup> It is not economic to assign funds to be spent on one object without reference to general conditions, under which road expenditure may in any one year be of minor importance, and the funds raised should be used for other purposes. Secondly, the right was given to payers of the taxes to demand that in effect they be spent for their benefit, ignoring the fact that the source of taxes was a luxury expenditure which ought to be available in large measure to relieve the burden on the taxpayers in general. None the less the influence of motorists and the motoring industry maintained this unsound system unimpaired until 1926, when the financial exigencies of the day induced the Chancellor to take seven millions from the balance to the credit of the account, and to reduce by a third its income and in 1927 a further twelve millions had to be taken. Hence the fund by 1931 was in a deficit, and the

<sup>1</sup> See *Parl. Pap.*, Cmd. 2599, 3123, and the annual reports of the Corporation. A share in the licence fees is reserved to the State.

<sup>2</sup> 10 & 11 Geo. V, c. 72, s. 3.

<sup>3</sup> Hills and Fellowes, *The Finance of Government*, p. 77 f.

balance had to be voted by the House of Commons as usual,<sup>1</sup> That the fund should be dropped and road expenditure dealt with in the ordinary way suggested itself, but the plan has not yet been adopted.

The Unemployment Insurance Fund<sup>2</sup> created in 1920 to receive contributions by workers, employers, and the State, was of a different character and more could be said in defence of its constitution and maintenance as a distinct fund. But the error was early created of borrowing first on a small and then on an ever-growing scale to maintain its solvency, in lieu of adjusting benefits and contributions in accordance with the variations in employment. In 1931 the outstanding debt had reached the sum of £115,000,000 and obviously formed a direct menace to the stability of the finance of the whole government.<sup>3</sup> It has under legislation of 1934 been placed on a more sound footing, and a liability has been imposed upon it, as in the case of the Road Fund, to pay back, in this case during a long term of years, the indebtedness which it has incurred to the State in placing it in a solvent position:

### § 8. THE CROWN LANDS

The Crown Lands are the only source of the hereditary revenues of the Crown which we need consider, though it may be well to bear in mind that there are other sources of hereditary revenue which are not now collected, or which are surrendered to general or specific purposes.<sup>4</sup> The net produce of such of the Crown lands as are part of the general revenue of the country, amounted in 1894 to £410,000, in 1934 to £1,320,000. These lands include all the hereditary landed property of the Crown except the Duchies of Lancaster and Cornwall, which remain a source of private income to the King and the Prince of Wales respectively.

<sup>1</sup> The National Economy (Road Service) Order, 1931, authorized the termination of certain rights and payments from the Fund, the cancellation of notices to treat, and the extension of terms for works.

<sup>2</sup> 10 & 11 Geo. V, c. 30. The legislation has been recast in the Unemployment Act, 1934, but the principle of a fund administered by a Board subject to a certain control of the Ministry of Labour prevails.

<sup>3</sup> Action had to be taken under 21 & 22 Geo. V, c. 48.

<sup>4</sup> These are the hereditary excise, the hereditary post office duties, and some smaller branches of hereditary revenue, for which see Return, 1869, pt. ii, pp. 456, 457.

Before the Conquest the King had rights over land of three sorts. He held lands as private property; he held lands in right of his kingship, demesnes of the Crown; he enjoyed rights over the rest of the land, including an initiative in granting portions of the waste lands or of his royal rights over other lands to individuals or corporations: to the exercise of this right the Witan were legally parties, though under the later Saxon monarchy their share in making the grant might be merely formal.

After the Conquest these three rights of the Crown merge in one, the right of the King over the land. The feudal King is the lord of the land, of whom all estates are mediately or immediately held. All land, therefore, which is not held by the tenants-in-chief or their vassals is held in full ownership by the King; the waste land, the reserve of national property, becomes the *terra regis*. Feudalism, which thus extended the rights of the Crown, provided also in the rules of escheat and forfeiture a means for their further extension. But at the same time the King ceases to be a private owner. The lands which he holds he may use for the maintenance of his own power, or for the security of the nation; he may sell them or give them away, but he can hold no land except as King; his property is inseparably associated with public duty.

An illustration of this rule is found in the fate of the Duchy of Lancaster, the private property of Henry IV before he ascended the throne. An Act of Parliament was needed to prevent the merger of the Duchy in the Crown lands, an Act obtained in the first instance by Henry IV, repeated with somewhat different provisions by Edward IV, and re-enacted from time to time until the present day. In times when the succession was in dispute, it is not difficult to understand the desire of the King to secure the property of his family to himself and his heirs, but in 1837 Lord Brougham contended that the country was entitled to these revenues.

A result of this rule may be seen in the constant supervision exercised by Parliament over the grants of land made by the King. The history of the royal seals indicates the desire to prevent the making of improvident grants; and if, in spite of these precautions, improvident grants were made, Parliament not unfrequently required their resumption. The

history of the Crown lands is therefore one of constant fluctuation in extent and value. Escheats, forfeitures, and the seizure of the estates of religious houses, increased the property of the Crown. Profuse grants to courtiers and favourites, sales made, as by Elizabeth, to save the taxpayer, or, as by Charles I, to avoid a summons of Parliament, reduced that property, till during the reign of William III, whose action was especially open to censure and induced Parliament to act, its income was estimated at £6,000 a year.

But Parliament, after the Revolution, was determined to control the amount and manner of the expenditure of public money. The sum to be placed at the disposal of the King was limited, and the objects on which money should be spent were marked out in the Civil List. It was estimated that a part of that sum would be provided by the income of the Crown lands, and Parliament could not allow the King to falsify this estimate by alienating at his pleasure the sources of the income calculated upon. When Anne succeeded to the throne, the Act which settled the revenue for her reign restrained the Crown, for that and all future reigns, from alienating the Crown lands. During three reigns the Crown lands formed a constituent part of the Civil List. The hereditary revenues were supplemented by a Parliamentary grant calculated to produce the amount which would enable the King to maintain his Court and pay the Civil services. The Crown lands could not be diminished by alienation, but they might fluctuate in value, and this introduced an element of uncertainty into the calculations of Parliament. George III on his accession surrendered to Parliament his interest in the Crown lands for his life, receiving in return a Civil List of a fixed amount, and his successors have followed his example as to the land revenues of the Crown in England and Wales. Since the beginning of the reign of George IV the same practice has been adopted with regard to the land revenues in Scotland and Ireland.

#### § 9. THE REVENUES OF SCOTLAND AND IRELAND

The revenues of Scotland and Ireland call for a brief notice. At the time of the union with Scotland the Crown had certain hereditary revenues corresponding in character to those of the

English Crown, and consisting in part of the rights of a feudal lord, in part of income arising from customs and excise and the Post Office, annexed to the Crown by Acts of the Scots Parliament.

The receipt and issue of the revenue took place in the Scots Exchequer, and the Court of Exchequer controlled the accounts of the Treasurer and Great Chamberlain, the officers of state responsible for the collection of the revenue. The Act of Union constituted the Scots Court of Exchequer not merely a Court for the decision of revenue cases, but an office in which the collectors of the revenue presented an account of their receipts. But in 1832 all powers and duties relating to the administration of the revenue were taken from the Exchequer and transferred to the Treasury at Whitehall.

The financial settlement between England and Scotland at the Union provided that, with certain exceptions as to the operation of existing taxes, the same customs and excise duties were extended to Scotland by 10 Anne, c. 19, and uniformity of postal arrangements was established by 9 Anne, c. 10. Taxation is uniform for the two countries, and since 1822 no distinction has been made between their revenues in the finance accounts of each year.

It appears that at one time Scotland paid an undue share of Imperial expenditure, but this is no longer the case, as recent conditions have reduced her resources, depressed her industries, and developed a movement for some form of self-government.<sup>1</sup>

In Ireland, as in England, the Crown had certain hereditary revenues, and the proceeds of certain taxes, customs, and excise duties granted from time to time by the Irish Parliament. But it is not necessary to trace the history of the revenues of Ireland, of its financial staff, or of its public debt. By the terms of the Union with England in 1801 these were kept distinct, but provision was made for their consolidation in certain contingencies. This consolidation was effected in 1817, when the offices of Lord High Treasurer of England and of Ireland were united, the revenues of the two countries brought into one fund, charged with the payments of the

<sup>1</sup> The official view of the Scottish Nationalist party formed in 1934 attributes the national difficulties largely to fiscal policy.



National debts of the two countries, which were henceforth to be treated as one.<sup>1</sup> The subsequent changes of 1834 and 1866 as to the Exchequer offices, as to the mode of controlling receipts and issues, and the audit of accounts, have consequently been applicable alike to Ireland and to England. The creation of Northern Ireland necessitated the establishment of an Exchequer for that territory<sup>2</sup> and the Irish Free State has its own organization, completely superseding for the Free State the English Treasury, which still acts on Imperial matters in Northern Ireland.

## II. COLLECTION AND EXPENDITURE OF REVENUE

### INTRODUCTORY

In order to understand so much as it may be needful to state of the history of this subject, it will be well to summarize the practice of the present day in the collection and expenditure of the revenue and the audit of the national accounts.

The revenue is collected by four great departments: the Customs, the Inland Revenue, the Post Office, and the Commissioners of Crown Lands. Other departments receive moneys directly or indirectly in the course of their business from fees, the sale of old materials, or similar sources. Sometimes these are used by the department as 'appropriations in aid' of the amount granted by Parliament to meet departmental expenditure.<sup>3</sup> Sometimes they are paid into the Exchequer and then fall under the head of revenue described in the Finance accounts as 'miscellaneous'.

Every sum received by these departments is paid into the Consolidated Fund of the United Kingdom; that is to say, it is paid to the credit of the Exchequer account at the Bank of England; or, in Northern Ireland, at the Bank of Ireland. From this fund nothing is paid except by Parliamentary authority. When the authority of Parliament has been given the King directs issues to be made in pursuance of it by an

<sup>1</sup> This was under the provisions of 56 Geo. III, c. 98, which took effect on the 5 Jan. 1817.

<sup>2</sup> 10 & 11 Geo. V, c. 67, s. 20.

<sup>3</sup> Under the Public Accounts and Charges Act, 1891, such sums are deemed to be money provided by Parliament. The Appropriation Act each year prescribes the amount of such appropriations as well as of the sum to be drawn from the Exchequer.

order to that effect countersigned by two Lords of the Treasury.

But this order is not of itself sufficient to procure an issue of the money for the objects specified by Parliament and the King. It empowers the Treasury to call upon the Comptroller and Auditor-General to give to the Lords of the Treasury a credit on the Exchequer account at the Bank. When this credit is given the Bank is requested to transfer the sums specified to the account of the Paymaster-General, and the Paymaster-General is thus enabled to make the payments required by the several departments in accordance with the votes of Parliament. So far security is taken that money voted by Parliament is issued for the purposes indicated by Parliament; it remains to secure that the money is not only issued but spent in accordance with the votes.

So we must note that the Comptroller-General is also the Auditor-General. In that capacity he must satisfy himself by an examination of the accounts, either periodical or concurrent during the financial year, that the payments for which he has given credit are not merely spent on the public service, but have been spent on the services for which he set free the Exchequer balance; that is, for the services specified by Parliament. If not satisfied on this point he must report the facts to Parliament in detail. When the House of Commons receives the departmental accounts of the expenditure on the several votes, together with the Comptroller and Auditor-General's report thereon, they are referred to the Public Accounts Committee, which in its turn reports to the House. Thus the circle is complete: the House which voted money for certain purposes receives full information as to the expenditure of the money on those purposes.

### § 1. HISTORY OF THE EXCHEQUER OFFICES

With this brief outline of the present mode of receipt and expenditure of the public money in our view, we may go back and trace the older system of the Exchequer.<sup>1</sup>

It must be borne in mind that until comparatively recent

<sup>1</sup> The reader who is interested in this part of our constitutional history should refer to *The Antiquities of the Exchequer*, by Hubert Hall.

times the various collectors of revenue actually paid the sums collected by them into the Exchequer, where the money was kept in the Tellers' offices until it was required for public service. The sheriffs were, in the early days of the Exchequer, the great collectors of revenue. In time their functions in this respect vanished before new sources of revenue and new modes of collection, but the Exchequer of Receipt remained the storehouse to which and from which the public money came and went.

Late in the eighteenth century it became the practice to make these payments into and out of the Bank of England; but every day and all day they were accounted for, as made, to the Exchequer, and in the evening the Tellers' chests were opened, and money was paid in or taken out as the balance might be in favour of the Exchequer or adverse to it.<sup>1</sup>

The Norman Exchequer was divided into two Courts: the Upper or Exchequer of Account, the Lower or Exchequer of Receipt. The Upper Exchequer, consisting of Treasurer, Chancellor, and other great officers, the Barons of the Exchequer, exercised a control over all persons who collected or expended the royal treasure. Accounts were here audited and those legal questions relating to revenue were here determined which gave its original jurisdiction to the Court of Exchequer. Its revenue jurisdiction, extended by fictions, made it into a great Common Law Court, severed except in a formal sense from the ancient Exchequer. Its duty as a place of account and audit was discharged with less and less efficiency, till at the end of the eighteenth century the lucrative sinecures which purported to be offices of audit were abolished, and the duty of auditing the public accounts was assigned to a body which has no historical connexion with the Exchequer of Account.

As some of the King's revenue was paid at the King's palace, 'in camera regis',<sup>2</sup> the Chamberlain was, with the

<sup>1</sup> Public Income and Expenditure Return, 1869, *Parl. Pap.*, 1868-9 (366), pt. ii, pp. 342, 343. See too 'Recollections of a Civil Servant', *Temple Bar Magazine*, Feb. 1891, at p. 209.

<sup>2</sup> Madox, cited in *Return*, 1869, ii. 340, 341, and see Stubbs, *Const. Hist.* ii. 276, as to the confusion in the fourteenth century, of the household and the national accounts. Under Henry VII and Henry VIII the King's Chamber was given control under the King alone of (1) profits of Crown lands;

Treasurer, a chief officer of the Exchequer of Receipt. The Chamberlain's office broke up into three: the hereditary sinecure office of the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlains of the Exchequer.

The payer of money into the Exchequer received a tally, or one half of a notched stick split down the middle; the notches corresponded to the amount paid, and that amount was also written at the side. The other half was kept at the Exchequer. Similar tallies were given to persons who were entitled to receive money from the Exchequer, where it was intended that they should obtain the money from some public accountant on its way to the Exchequer. These tallies were in use until 1826, when, by the death of the last of the Chamberlains, an Act passed forty-four years earlier came into operation,<sup>1</sup> and their use was discontinued.

The ancient process of the Exchequer was simple. Three officers, the Treasurer's clerk and the two Chamberlains, kept three separate accounts of money received; they paid out money due under orders, properly authenticated under the Great or Privy Seal, addressed to the Treasurer and Chamberlains, from the Crown, and kept a similar triple record of money so paid. These last were called pells of issue, or parchment rolls on which the money paid out was entered. The accounts of each officer were compared with those of the other two, daily, weekly, half-yearly.

In the reign of Henry VII this record of issues was discontinued, but that of receipts was still made, for a century in triplicate, afterwards by one of the Treasurer's clerks. The issue and record of issue of public money was placed in the hands of four new officers, the Tellers of the Exchequer, who

(2) customs on the staple commodities; (3) profits of lands forfeited for treason or felony; (4) profits of mints and the exchanges; (5) fines levied by commission, and occasionally subsidies. The Exchequer, however, reappeared under Mary as the supreme financial machine. See Newton, *E.H.R.* xxxii. 348 ff. For the Chamber and the Wardrobe see Tout, *Chapters in Mediaeval Administrative History* (1920-33).

<sup>1</sup> 22 Geo. III, c. 82. The rest of their history is not commonplace. The returned tallies were stored in the ancient Star Chamber, which they filled from floor to ceiling. When, in 1834, it was desired to use this room, orders were given to destroy the tallies. They were used as fuel in the stoves which warmed the Houses of Parliament; they overheated the flues, and burned down the Houses.

accounted to the clerks of the Treasurer for disbursements made.

Of the three parties to the triplicate record of earlier times the Chamberlains' duties dwindled to the preparation and custody of the tallies; but the clerical staff of the Treasurer developed for themselves a new, and as it proved, a very remunerative sphere of activity.

One of them received and audited the Tellers' accounts, and hence was called Auditor of Receipt; in course of time his concurrence became necessary to the issue of money. Another, whose duty it had been to write out a pell or parchment of the receipts, obtained authority under the Privy Seal to make a similar pell of the issues. His office, that of Clerk of the Pells, became a record office of all receipts and issues.

Here we have the Exchequer staff down to the year 1834. Four Tellers, who received and paid out the revenue; a Clerk of the Pells, who recorded all issues and receipts; an Auditor of Receipt, who kept a similar record, and who had important duties with respect to the issue of money; and until 1826 Chamberlains, who struck the tallies and examined the two parts to see that they corresponded.

These offices were paid until the commencement of the nineteenth century by fees and percentages; their duties were discharged by deputy, and they formed the great prizes of political life, whereby a minister was enabled to provide for his family. Thus in 1821 Lord Camden was a Teller; the Auditor of Receipt was Lord Grenville. With the shocking disregard for public interest of the times, these officers drew enormous salaries from fees of office. In 1812 Lord Camden, the last of the Tellers, voluntarily fixed his pay at £2,700 a year, losing in consequence by 1834, when the office was abolished, £244,000. His fellow sinecurists continued their plunder of the State.

## § 2. THE CONTROL OF ISSUES

We may now study the working of this machine. But we must bear in mind that the Treasurer and the Chancellor of the Exchequer were the officers ultimately responsible; that they were responsible to the King; that the Exchequer was a means of ensuring that the King got his rights, and paid no

more than he was obliged to pay; and that the idea of a Parliamentary control over the issue and expenditure of the Exchequer receipts was foreign to the minds of those under whose care the machinery of the Exchequer was elaborated.

The relations of Parliament to the expenditure of the revenue may be said to have passed through two stages prior to 1834, when old offices were abolished and the control of issues and audit of accounts were brought into the same hands and the result reported to the House of Commons.

In the first a life-income was assigned to the King, in addition to his hereditary revenues, to be spent as he pleased. So long as the King did not exceed this income Parliament asked no questions. If he wanted more, Parliament was moved to ask where the money had gone, and why more was wanted; but the Commons were more concerned to prevent illegal taxation than unauthorized expenditure.

But it should be noted as a check on the powers of the Crown in administration that the King's command was not enough to authorize an issue of his treasure; that such a command must be authenticated by Letters Patent or writ under the Privy Seal. And further that the withdrawal of the Treasurer from active participation in the routine of the Exchequer led to a complicated system of Treasury warrants, preliminary to the issue of public money, known as 'the course of the Exchequer', and strictly enjoined upon the officers for the receipt and issue of public money by 8 & 9 Will. III, c. 28.

The second stage began with the appropriation to certain purposes of subsidies granted to Charles II. It was developed after the Revolution into a complete appropriation of all supplies except the hereditary revenue. Even these were considered as practically appropriated to the Civil List, and were taken account of in the sum assigned to the purposes of the Civil List. From the time that George III surrendered his hereditary revenues no money could be expended without the consent of Parliament.

We will now trace the control of issue and the history of the audit of accounts as they existed between 1688 and 1834.

The process began then, as now, with a royal order, which was an authority for letters of Privy Seal. These were transmitted through the Treasury, together with a Treasury

warrant for the issue of the money required, to the Auditor of Receipt. That great personage himself signed an order for payment, and returned it to the Treasury with the warrant. Both documents came back signed by members of the Treasury Board, together with a letter specifying the date at which the money was to be issued, and the fund out of which it was to be paid.<sup>1</sup>

Thereupon the Tellers unlocked one of the four chests, one of which was kept in the room of each Teller. Even this could not be done without the aid of the Auditor and the Clerk of the Pells, for each chest had three locks, and Teller, Auditor, and Clerk each had the key of one. So when the deputies of these three functionaries had opened a chest, and had handed some portion of its contents to an individual payee or to a Bank cashier to be placed to the credit of a department which had an account at the Bank of England, the Exchequer had done its work as regarded that particular *item* of expenditure.

The Auditor of Receipt was the hinge on which turned the lid of the Treasury chest, for the Act of William III<sup>2</sup> forbade the Tellers to issue money without his order. He was in fact a Controller rather than an Auditor. His functions were to see that money was legally issued, not that it was properly spent.

The value of the office to the public service would depend entirely on the independence of the Auditor in respect of political or party ties, for it would be his duty to resist attempts on the part of the Crown or its ministers to use public money either without Parliamentary authority or for purposes other than those authorized by Parliament.

How far the holder of the office took this view of his duties may be learned from the conduct of Lord Grenville. He was Auditor of Receipt from 1794 to 1834, when he held a prominent place in politics as leader of the Whig party.

In 1806 he became Prime Minister, and proposed to take the office of First Lord of the Treasury. In this capacity he would be responsible for the royal orders and Treasury warrants, the validity of which he would have to consider as Auditor. But he did not propose to resign the Auditorship,

<sup>1</sup> *Return*, 1869, ii. 343.

<sup>2</sup> 8 & 9 Will. III, c. 28.

and eventually Parliament enabled Lord Grenville to place the Auditorship in the hands of a trustee during his continuance at the Treasury Board;<sup>1</sup> but it is plain that neither he nor his friends saw any incongruity in the tenure by the same man of two logically incompatible offices.

In 1811 Lord Grenville, who was then in opposition, was extremely anxious, in the interests of his party, that a Regency Bill should be pushed on, and that it should impose the least possible restraint upon a Regent who was supposed to favour the Whigs. He therefore developed an extremely sensitive conscience, and refused to approve a Treasury warrant for army and navy expenditure, provided for by Parliament, in the absence of authority under the Privy Seal, the King's insanity preventing the affixing of his signature to the necessary warrant.

He thus was able to hurry on the Regency Bill, to inconvenience his political opponents, and finally to obtain a resolution of both Houses which satisfied his conscience in doing what the needs of the public service imperatively demanded,<sup>2</sup> and what an honourable man would at once have done.

### § 3. THE AUDIT OF ACCOUNTS

We have now dealt with the process of issuing public money and the securities offered by the 'course of the Exchequer' that money was not issued save for purposes authorized by Parliament.

We must next inquire what were the means for ascertaining whether money, issued in accordance with Parliamentary authority, had been actually spent as intended. Revenue issued to a department for one purpose might be spent on another; or the persons to whom it was issued might squander or misapply it. In the first instance Parliament would be defrauded, in the second both Parliament and the Crown.

Some sort of audit existed from very early times.<sup>3</sup> The receivers of revenue accounted to the Treasurer and Barons, and later to the Auditors of Imprest, and the issue of money was audited first by the Barons, then by auditors appointed

<sup>1</sup> Cobbett, *Parl. Debates*, vi. 149.

<sup>2</sup> *Ibid.* xviii. 753-802.

<sup>3</sup> Return, 1869, ii. 331, and see Thomas, *History of Exchequer*.



for different classes of expense. A systematic audit appears to have been provided in the reign of Elizabeth, when Auditors of Imprest, or money issued for public use, were established. The two Auditors of Imprest, like the great officers of the Exchequer, were paid by fees and did their work by deputy. In 1780 Commissioners of Public Accounts were appointed to inquire into the whole system of 'receiving, collecting, issuing, and accounting for public money',<sup>1</sup> and to make recommendations.

The system of audit as then practised fell under their scrutiny. It was found to be an expensive farce. In the year 1783 each Auditor enjoyed an income of £16,000 a year.<sup>2</sup> In 1785 they were abolished by Statute,<sup>3</sup> and a body of five Commissioners appointed for auditing the public accounts.

This can hardly be said to have been an immediate success, for in 1806 the Chancellor of the Exchequer complained that the expenditure of more than £45,000,000 of public money was at that date unaudited.<sup>4</sup> But this Audit Board inherited large arrears from its inefficient predecessors. Its powers were extended by Statute and its working proved efficient in a high degree. Its duties were, however, transferred to the Comptroller and Auditor-General by the Exchequer and Audit Departments Act, 1866, to which reference will be made below.

The institution of the Audit Board was followed in 1787 by the institution of the Consolidated Fund. From the Revolution until 1787 it had been the practice to assign specific taxes to specific charges, with the result that the public accounts became extremely complicated. In the Customs, for instance, there were seventy-four separate accounts, each setting forth the receipt of revenue from a particular source and its expenditure on the service to which it was appropriated. In 1787 was established the Consolidated Fund into which was 'to flow every stream of the public revenue and from whence to issue the supply for every public service'.<sup>5</sup> The produce of particular taxes was no longer appropriated to particular heads of expense.

<sup>1</sup> 20 Geo. III, c. 54.

<sup>2</sup> Return, 1869, ii. 331.

<sup>3</sup> 25 Geo. III, c. 52.

<sup>4</sup> Cobbett, *Parl. Debates*, vii. 300.

<sup>5</sup> Thirteenth Report of Commissioners of Public Accounts, p. 60, March, 1785. The Consolidated Fund was established by 27 Geo. III, c. 13.

From the death of Anne until 1802 no regular statement of the finances of the country was compiled or published, and until 1822 no *balanced* annual account of the public income and expenditure was presented to Parliament.

Since 1822 such statements have been regularly presented. In 1826 the Chamberlains and their tallies disappeared.

In 1832 besides the *cash* account there was introduced an *appropriation* account of the money received for expenditure on the Navy. This form of account, which presents the correspondence of the Parliamentary grant with the ultimate outlay, has since been applied to every head of public expenditure.<sup>1</sup>

#### § 4. THE REFORMS OF 1834-66

In 1834 the Exchequer offices were abolished, and with them the costly sinecures, the cumbrous procedure, the unintelligible numerals, which had formed part of the 'course of the Exchequer'.<sup>2</sup>

Henceforth the revenue of the country was to be paid to the Exchequer account at the Banks of England and Ireland, and the payments which had been heretofore made at the Exchequer itself (as distinct from those made through the Paymasters of the Army, Navy, and Ordnance) were to be made by one person, a Paymaster of the Civil Service.

The Comptroller-General and his staff took the place of the Auditor of Receipt and Clerk of the Pells. He was now sheltered from political or party prepossessions by a disability to sit in Parliament; like the judges, he held office during good behaviour, but was removable by the Crown on address of both Houses of Parliament.<sup>3</sup> Without his authority no money could be issued from the Exchequer account by the Banks of England and Ireland. Every credit which he opened there in favour of any department of the public service was recorded in his office, and this record was the foundation of the Public Accounts.

<sup>1</sup> Applied to Naval expenditure by 2 & 3 Will. IV, c. 40; to Military expenditure by 9 & 10 Vict. c. 92; to all expenditure by 29 & 30 Vict. c. 39.

<sup>2</sup> Instead of seventy-five clerks, besides messengers and watchmen, the new establishment consisted of the Comptroller-General, the Assistant-Comptroller, the chief clerk, the accountant, and five clerks, in the principal office; 'Recollections of a Civil Servant,' *Temple Bar Magazine*, Feb. 1891.

<sup>3</sup> 4 & 5 Will. IV, c. 15.

In 1836 was constituted the office of Paymaster-General through whom are now paid all the public moneys due for the Army, Navy, and Civil Services.<sup>1</sup>

In 1861 the House of Commons adopted the recommendation of the Committee on Public Moneys, that a Committee of Public Accounts should be annually appointed to report on the accounts presented to the House. Of the duties of this Committee we will speak presently.

In 1854 the financial year was finally adjusted: it had previously varied from time to time. Until 1793 it began on 11 October, Old Michaelmas Day: from 1793 a supplementary account was made up to 5 January, and in 1802 the financial position of the country was required to be stated in a return made up to 5 January and presented to Parliament before 25 March.<sup>2</sup> In 1832 Lord Althorp, the Chancellor of the Exchequer, asked for supplies for a year ending on 31 March, taking five quarters in one financial year; and in 1834<sup>3</sup> the newly constituted Comptroller-General was required to present an account annually of payments into the Exchequer, of credits granted, and of moneys drawn, for a financial year ending on 5 April. From this date until 1854 the Treasury kept one financial year ending with 5 January, the Comptroller-General another ending with 5 April, while the supplies were granted for a year ending on 31 March. In 1854<sup>4</sup> the last date was fixed for all financial purposes.

In 1866 the Audit Board and the Comptroller-General were abolished by the Statute on which rests our present system of control of issue and audit of accounts.

## § 5. THE EXCHEQUER AND AUDIT ACT AND MODERN PRACTICE

We stated at the outset of this chapter that the revenue of the country, as it is collected by the departments responsible for its collection, is paid into the Consolidated Fund in the Bank of England.<sup>5</sup> This Fund is not a hoard, but a balance.

<sup>1</sup> See 5 & 6 Will. IV, c. 35; 11 & 12 Vict. c. 55, whereby the various offices of Paymaster were consolidated into one office. Under 52 & 53 Vict. c. 53, s. 1, the Treasury may regulate the conduct of the duties of the office.

<sup>2</sup> 42 Geo. III, c. 70.

<sup>3</sup> 4 & 5 Will. IV, c. 15.

<sup>4</sup> 17 & 18 Vict. c. 94.

<sup>5</sup> We may ignore the cases of payment into the Bank of Ireland. For the position of the Bank as regards government securities, see S.R. & O., 1923, Nos. 227 and 453 under 13 Geo. V, sess. 2, c. 2, s. 6.

The Bank can use it, as any other banker can use the balance of his customer, so long as it is forthcoming when required.

The Customs and Excise, Inland Revenue, and Post Office are the departments in which revenue is constantly accruing. The Receiver of the Commissioners of Crown Lands who manage the Crown lands is also in communication with the Bank, but only the net proceeds of the department are paid over. The departments in which miscellaneous revenue accrues are not collecting departments, nor are most of them in direct communication with the Bank. The moneys which they receive are treated as appropriations in aid and are paid into the cash account of the Paymaster-General.<sup>1</sup>

The collectors of these three departments send the daily proceeds of their collection to the accounts of their respective departments at the Bank, reserving, under regulations to be explained hereafter, certain sums for local expenditure. The departments pay over, daily, the amount received to the account of the Exchequer, that is, to the Consolidated Fund. Sooner or later every penny of revenue collected—including, as we will presently show, the sums reserved by collectors for local use—finds its way to the Consolidated Fund.

The revenue may increase or diminish from two causes. Parliament may increase or diminish taxation, or commercial and agricultural prosperity may wax and wane. But we are not concerned here with the economical considerations which affect revenue. We must assume that, such as it may be, it is flowing steadily into the Exchequer balance, and that the expenditure of the country is going on at the same time; and we ask, How is the revenue made applicable to the expenditure?

For any use of the public money the authority of Parliament is universally necessary. If that authority is, in certain cases and under settled rules, anticipated, as when the collectors of revenue meet the immediate charges of their departments, their action, in order to be legal, must be ratified by Parliament in the course of the year.

But the authority given by Parliament is of two kinds, permanent and annual; and this at once divides the expenditure

<sup>1</sup> If the sums exceed the amounts of appropriations in aid voted by the Commons, the surplus goes to the Consolidated Fund, unless special legislation is passed.

of the country into two classes, the first consisting of fixed charges on the Consolidated Fund, or *Consolidated Fund Services*, the second consisting of sums granted every year by Parliament, the grant being initiated by the House of Commons in Committee of Supply, and hence called *Supply Services*.

The process by which Parliament votes these annual services has been described elsewhere.<sup>1</sup> The matter before us is how, when voted, they are spent.

The public service is maintained by payments made under the direction of the Treasury out of the national balance, the Consolidated Fund. But neither the Lords of the Treasury, the political executive, nor their permanent staff can touch this balance without the intervention of an official who is remote alike from royal and political influences.

This is the Comptroller and Auditor-General, the creation of the Exchequer and Audit Departments Act, 1866.<sup>2</sup> He is appointed by Letters Patent. Neither he nor the Assistant-Comptroller and Auditor may be a member of either House of Parliament. They hold office during good behaviour, and they are removable by the King upon address by both Houses of Parliament. They may not hold their offices in combination with any others held at the pleasure of the Crown. Their salaries are charged on the Consolidated Fund, so that they do not come under the annual consideration of the House of Commons, and to increase their remuneration without prior Parliamentary assent is clearly unconstitutional.

### *Consolidated Fund Services*

Where money is wanted to meet *Consolidated Fund Services* the Treasury makes a requisition to this officer for a credit on the Exchequer account. The Comptroller and Auditor-General, if satisfied that the requisition is in accordance with the Acts which govern the proposed expenditure, makes the order, and thus unlocks the Treasury chest. The Treasury then calls upon the Bank to transfer the sums required from the Exchequer account to that of a principal accountant, usually the Paymaster-General;<sup>3</sup> and at the same time to transmit the

<sup>1</sup> Vol. i: *Parliament*, ch. vi, sect. iii, § 2.

<sup>2</sup> 29 & 30 Vict. c. 39, s. 3.

<sup>3</sup> Payment of dividends due by way of interest on the National Debt is made by the Banks of England and Ireland.

authority for the transfer to the Comptroller and Auditor, who is thus enabled to record the issues from the Exchequer. Of these he subsequently receives and examines an account called the Consolidated Fund Account.

The charges on the Consolidated Fund amount to more than one-third of the national expenditure.<sup>1</sup> They are to be seen in detail in the Finance Accounts of each year. They fall into four groups: (1) the interest and management of the National Debt; (2) payments to the Northern Ireland Exchequer; (3) other consolidated fund services; (4) Post Office fund. It includes the great and the small, from £224,000,000 (1935-6) for the National Debt, to salaries of the Judges, of the Speaker, and of the Regius Professor of Civil Law in the University of Oxford.

### *Supply Services*

The remaining part of the national expenditure is voted every year by Parliament.<sup>2</sup> We must consider how this expenditure is estimated, voted, and paid.

The formal procedure begins with a Treasury Circular of 1 October asking for estimates to be supplied, usually by 1 Dec. The estimates for the Army, Navy, Air Force, Civil Service, and Revenue Departments are presented by the departments<sup>3</sup> concerned, separately, to the Treasury. There they must be considered and approved: for the Treasury guards the public purse, and the Chancellor of the Exchequer, who must ask the Commons to vote the money, becomes thereby responsible for the demands of these departments.

Important questions of expenditure on the Army, Air Force, and Navy are settled by him, probably earlier in the

<sup>1</sup> The total Consolidated Fund services for 1934-5 were £320,149,442; the Supply services, £529,079,675. The total self-balancing expenditure (Post Office and Road Fund) was estimated at £86,673,000.

<sup>2</sup> The executive cannot, in view of the necessity of a Parliamentary vote, conclude any agreement involving payments except on the understanding that its validity is dependent on the approval of Parliament; cf. *Churchward v. The Queen* (1865), L.R. 1 Q.B. 173; *A.G. v. Great Southern and Western Railway Co. of Ireland*, [1925] A.C. 754. Hence money paid under a contract may be recovered if not appropriated by Parliament: *Auckland Harbour Board v. The King*, [1924] A.C. 318; cf. Keith, *The Constitutional Law of the British Dominions*, pp. vii, viii, 387; *Journ. Comp. Leg.*, xv. 117 f.

<sup>3</sup> The defence estimates are presented only in total in the first place; the details are given only when the estimates are sent for final sanction.

year, with the heads of those great departments, often in the Imperial Defence Committee of the Cabinet. Such questions are matters of general policy, and these estimates when agreed to by the political chiefs are only subject to Treasury supervision in minor details.

But the Chancellor of the Exchequer may find himself in conflict with the heads of the spending departments. The War Office, for instance, may want more than he thinks it necessary or prudent to ask Parliament to grant. He may then urge that economy is essential and ask that the department revise its estimates, or he may, with the aid of his permanent staff, contest the various items of expenditure and endeavour to convince the War Office that less will suffice. If the parties cannot agree they may appeal to the Prime Minister, and the ultimate issue may be left for the decision of the Cabinet. Here the dispute must end in one of three ways—by one or other minister accepting defeat, or by the resignation of the minister against whom the decision of the Cabinet has gone,<sup>1</sup> or by a compromise in which the Chancellor of the Exchequer agrees to ask for a sum rather larger than he considers to be necessary, while the Secretary of State for War agrees to forgo, or postpone, some outlay which he believes to be important for the public service.

In regard to the civil estimates the Chancellor's opportunity comes when the Cabinet considers projects of legislation.

But the more valuable part of Treasury control consists in the need of Treasury sanction to the creation of any new post or the increase of any salary in the Civil Service; or to any change in the precise methods of expenditure indicated in the estimates. Payments made for such objects without such sanction would be disallowed at the audit of accounts; and this sort of supervision, backed, as we shall see, by the provisions for audit, stops the constant leakage of public money in *items* of outlay, trivial perhaps in themselves, but amounting in the mass to a heavy demand upon the taxpayer.

But let us suppose the parties to be agreed. The estimates

<sup>1</sup> Cf. Lord R. Churchill's resignation in 1886 when Smith and Lord G. Hamilton had the Prime Minister's support on the Army and Navy estimates; see Oxford, *Fifty Years of Parliament*, i. 158-60. Gladstone's resignation in 1894 was largely due to disagreement with the Cabinet on Navy estimates; *ibid.* i. 215-17.

for the Army, Air Force, and Navy, the Civil Service, and Revenue departments are submitted to the House of Commons in certain large subdivisions or chapters, technically called '*votes*'.

If the House of Commons approves of these estimates it agrees to them by votes in Committee of Supply, which votes are reported to the House. To provide for these votes the House goes into Committee of Ways and Means, and there makes the necessary grants from the Consolidated Fund. These resolutions in Committee of Ways and Means, reported to and adopted by the House, are (as explained elsewhere) embodied in Bills, once or twice throughout the Session. Such a Bill, when it has passed the Lords and received the assent of the Crown, becomes a Ways and Means Act, or Consolidated Fund Act, and gives Parliamentary authority for the payment of public money while the Session is going on, and before the Appropriation Act is passed. This Act embodies any previous Acts, sets out in detail the votes sanctioned by the Commons in Committee of Supply, and appropriates to them specifically the sums needed from the Consolidated Fund.

Pending the Appropriation Act, a Consolidated Fund Act (or if necessary more than one) is passed to provide for the immediate needs of the Army, Air Force, Navy, Civil Service, and Revenue Departments, so far as Parliament is concerned.

A brief explanation may be needed as to the Consolidated Fund Act, which is passed every year before 1 April. The financial year ends on 31 March, and the funds provided by the Appropriation Act of the previous year are no longer available unless already issued. Some provision is necessary to carry on the business of the country during the remainder of the Session while the House of Commons is discussing votes in supply, and until the passing of the Appropriation Act for the year. For this purpose the Government obtains some votes (men, pay, works, and one or two others) for the Army, Air Force, and the Navy respectively, and a vote on account for the various branches of the Civil Service and Revenue. The reason for this difference is that in the case of the Army, Air Force, and Navy but one account is kept for each service,<sup>1</sup> and money

<sup>1</sup> The expenditure for Army, Air Force, and Navy is often incurred at a distance, and through sub-accountants, or, in case of service abroad,



granted under any one vote may be temporarily applied to purposes specified in other votes, provided always that by the end of the year the issues of money correspond with the votes embodied in the Appropriation Act. The Civil Service and Revenue votes have each a different account at the Pay Office, and so a sum has to be obtained on each vote for the expenditure on these departments. This is done by means of the vote on account taken before 31 March in every year, by which money is granted and its issue authorized for each branch of these services. They are thus enabled to carry on their business until their full votes have been discussed, granted, and embodied in the Appropriation Act. We now can pass from the Parliamentary authority to the acts done under that authority.

The money has been granted to the Crown by Parliament for certain purposes: and the first step in the process of expenditure is the formality of a Royal Order, reciting the grant and desiring the Treasury to authorize the Bank of England to make payments from time to time in accordance with the terms of the grant. The order is under the sign manual and is countersigned by two Lords Commissioners of the Treasury.<sup>1</sup>

The Lords Commissioners thereupon require the Comptroller and Auditor-General to give them credit for the sums necessary upon the Exchequer account at the Bank. This is done. The Treasury then, from time to time, directs the Bank to transfer the sums specified in the Royal Order to the 'supply account'<sup>2</sup> of the Paymaster-General, and to communicate such transfers to the Comptroller and Auditor-General.

The departments are then informed that the sums voted by Parliament, or part of them, are placed to their account with the Paymaster-General. Thenceforth they are responsible for the disposition of the money in accordance with the votes, and this responsibility is enforced by the Comptroller and Auditor-General.

through the Treasury Chest (*vide infra*). The issues cannot therefore conveniently be made for the service specified in each separate vote.

<sup>1</sup> For the forms relating to this expenditure see Appendix, § 7, below.

<sup>2</sup> Its alternative name is the Exchequer Credit Account, and with the cash account, into which appropriations in aid are paid (p. 182, *ante*), it constitutes the accounts of the Paymaster-General for supply of credit.

*Account and Audit*

We have seen (1) that the produce of the taxes imposed by Parliament must lie at the Exchequer account in the Banks of England and Ireland until Parliament has given authority for its expenditure, and (2) that so much of this produce as is granted from time to time by Parliament to the Crown cannot be withdrawn by the servants of the Crown from the Exchequer balance without the sanction of an independent, non-political officer.

We have still to see how security is taken that the money issued for certain purposes is actually expended on those purposes: that not merely the issue, but also the expenditure of the money paid corresponds with the votes.

The security required is obtained by the twofold powers of the Comptroller and Auditor-General. He not only controls the issues, but receives and audits the accounts of expenditure. Every day two accounts are furnished to him, one from the Banks of England and Ireland, of receipts and issues of the Consolidated Fund, and one from the Revenue departments, of the sums paid to the Fund. These (which are also supplied to the Treasury) enable him to check the Bank account as to receipt of revenue. He also follows, very closely, the course of expenditure, having in the larger spending departments a local staff whose audit may be said to be concurrent with the outlay. In smaller departments his audit is periodical and monthly.<sup>1</sup> He also, as far as is practicable, audits receipts, sending down officers to make test audits.

In respect of the Consolidated Fund Services and the Supply Services, Parliament receives every year Finance Accounts and Appropriation Accounts.

The Finance Accounts are laid before Parliament on or before 30 June in each year. They are prepared by the Treasury, and they contain a detailed statement of the receipts and of the issues for Consolidated Fund Services as well as Supply Services. But, so far as expenditure is con-

<sup>1</sup> Of some 230 staff, 190 or so are in the large departments. It is impossible to audit completely, and under the Exchequer and Audit Act, 1921, he is authorized for civil votes as well as defence votes to take sections of expenditure for test.

cerned, these accounts only state the purposes for which the money was issued.

The Appropriation accounts on the other hand are rendered to the Comptroller and Auditor-General by the departments which have been entrusted with the expenditure of public money. They are examined by him in order that he may ascertain whether (1) there are due vouchers for alleged expenditure, and (2) whether the money has been spent in accordance with the votes of Parliament: whether any Acts of Parliament, Orders in Council, Royal Warrants or other authority governing any particular expenditure have been duly complied with; whether increased salaries or new offices have arisen without the previous sanction of the Treasury. Thus the Comptroller and Auditor-General acts on behalf of the House of Commons and of the Treasury, ensuring not merely that expenditure is in correspondence with the votes, but that it is made subject to the control with which Parliament has invested the Treasury. The Appropriation accounts relate to Supply Services only, but the Consolidated Fund Services are also examined and reported upon.

Our expenditure is spread over a wide surface, and the accounts of the financial year ending on 31 March do not all reach the Comptroller and Auditor-General until 31 December following: but in February of the next year his report is laid before the House in volumes dealing with the Army, Air Force, Navy, Revenue Departments, and Civil Service.

The House refers the reports to the Public Accounts Committee—a standing Committee of fifteen members presided over by a member of the Opposition, usually a former Financial Secretary to the Treasury. It examines them and calls attention to any want of correspondence between votes and payments or other irregularity which may appear on the reports of the Comptroller and Auditor-General.

The Reports of the Public Accounts Committee are dealt with in the first instance by Treasury Minutes, directing the spending departments to observe the recommendations made by the Committee.<sup>1</sup> A serious discrepancy between the votes

<sup>1</sup> If the Treasury disagrees with the Committee, it may take up the matter with the Committee and secure reconsideration of the recommendation in its next report.

and the expenditure would no doubt be taken up by the Opposition and dealt with by the House. The House of Commons should, but rarely does, deal with the report, but the Treasury reports to it what action has been taken on it. Unfortunately the report is very belated, and the audit itself is subject to the disadvantage of inability to test the real value of expenditure.<sup>1</sup>

So we may summarize this procedure. The Commons vote and Parliament enacts that certain sums shall be granted to the King for certain purposes. It is the business of the Treasury to see that the money so granted is issued for the purposes for which it was granted. After this the departments which receive the money are responsible for its proper application. The duties of the Comptroller and Auditor-General are, as regards issue, ministerial; as regards expenditure, judicial. When he is satisfied of the intentions of Parliament that money should be spent on a given object he ministers to the needs of the Treasury; when the money has been spent he judges whether or no it has been spent in accordance with the votes of Parliament.

When he has reported to the House of Commons the circle is complete, and the House which granted and appropriated the money learns how far its intentions have been carried into effect.

There are still a few points to note.

Estimates prepared in November of one year may be found in the next to be insufficient, and this may be discovered before the end of the Session, or before the end of the financial year. When this happens supplementary estimates are presented either at the end of one session or the beginning of the next, so that supply may be granted, a Ways and Means Act passed, and the transaction concluded within the financial year which ends on 31 March.<sup>2</sup> The next Appropriation Act includes the transaction.

Or at the close of the account it may be found that a vote has been exceeded, that is to say, that a department has spent more on a given object than Parliament had granted that

<sup>1</sup> Hills and Fellowes, *The Finance of Government*, pp. 109-11.

<sup>2</sup> As to the financial year, *vide supra*, p. 181.

object. This would be matter for inquiry by the Public Accounts Committee. An excess vote is by their recommendation submitted to the House and passed, in order to make good the deficiency. It is included in the Appropriation Act next<sup>1</sup> passed.

It was stated in general terms that all payments were made through the Paymaster-General. But this must be qualified in certain ways.

First, the Treasury makes advances to sub-accountants of the Army, Navy, Air Force, and Civil Service at distant stations. This is done out of the Treasury Chest Fund, a banking fund with a capital of not less than £700,000, or more than £1,000,000, the dealings with which are regulated by Statute.<sup>2</sup> These advances are reclaimed throughout the year by the Treasury from the different departments to which money has been voted to meet these payments, and an account is rendered by the Treasury, at the end of the financial year, to the Comptroller and Auditor-General.

Next, the Treasury deals in like manner with another fund at its disposal, called the Civil Contingencies Fund, which has a fixed capital of £1,500,000. Advances made in anticipation of Parliamentary votes, and to meet unforeseen contingencies,<sup>3</sup> are all repaid to this fund by the orders of the departments concerned, on demand from the Treasury, when Parliament has voted the money. Repayments to this fund are not made until the year after the money has been advanced.

Thirdly, the collectors of revenue are authorized, under certain regulations, to make payments in their districts out of the funds which they collect. These payments may be needed for the expenses of the collecting department, or they may be advances to other services within the district, and

<sup>1</sup> Thus the Act for 1934-5 includes supplementary votes for 1933-4 and excess votes for 1932-3. It covers approval of transfers between defence votes which each department is allowed to make, subject to Treasury sanction, and ultimate Parliamentary approval.

<sup>2</sup> 40 & 41 Vict. c. 45; 56 & 57 Vict. c. 18.

<sup>3</sup> Thus in 1933 the *Codex Sinaiticus* was purchased from the Soviet Government for £100,000 and the money was advanced from this fund. It is an instance of the doubtful legitimacy of such an employment of the fund, and of the impotence of Parliament to criticize expenditure; *Commons Debates*, cccxii. 2542-53. Some three-fifths of the total were ultimately contributed from other sources.

may thus save the transmission of money to and fro. Such advances are repaid to the revenue department, and when repaid are at once paid into the Consolidated Fund.

Thus a collector of customs on a given day receives £700 of revenue, of which £150 is required for the expenses of his department, and £100 for the army. These charges he meets, and if the Bank of England has no local branch on the spot he pays in the remaining £450 to a local bank, obtaining a bill payable in three or four days in London. This he transmits to the Customs Office in London, together with vouchers for the £250 expended. The £450 is paid by the Customs at once into the Consolidated Fund. The two other sums will in due course be recovered out of money granted by Parliament in the one case for the Army, in the other for the collection of revenue, and issued to these departments, under the formalities described earlier. When recovered they are paid into the Consolidated Fund.

Thus all revenue, sooner or later, goes into the Consolidated Fund, and all payments are ultimately provided for by Exchequer issues.

Another feature to note in the mode of keeping and presenting the national accounts is that they are strictly *cash* accounts. Taxes due for the year 1934-5, but not paid till 2 April 1935, are treated as the receipts of the year 1935-6. Liabilities incurred in one year but not paid till the next are charged against the revenue of the year in which they are paid.

Although for purposes of account and audit nothing is treated as a final payment until accounted for as actually expended, yet issues made from the Consolidated Fund to the accounts of the various departments with the Paymaster-General are treated as expenditure for the purpose of an *interim* account. This practice, together with the daily record of receipts and issues, makes it possible to produce a statement of the national income and expenditure up to date, on any day, with a few hours' notice.<sup>1</sup>

<sup>1</sup> Note may be made of the anomalous Exchange Equalization Account, set up by the Finance Act, 1932 ss. 24-6 and later increased to enable the Treasury to check excessive fluctuations of exchange. Necessarily it is almost free from Parliamentary control, but the Comptroller and Auditor-General is empowered to examine the use made of it.

## § 6. CHANGE IN CHARACTER OF TREASURY CONTROL

Before the Revolution the Treasurer was concerned with expedients for raising revenue, and with the direction of expenditure. The Exchequer officers received the revenue, and took charge of it, and saw that it was not issued except by proper authority. But they all alike had to consider only the King's interest, and, except in the case of the appropriated subsidies of Charles II, to carry out the King's directions.

From the Revolution onwards the Treasury and Exchequer have been called upon to carry out the directions of Parliament in respect of supplies specifically voted for and appropriated to certain purposes.

Throughout the early part of the eighteenth century the duties of the Treasury Board were carefully discharged. The representatives of the Army, Navy, and Ordnance came to the Board for the moneys voted by Parliament, and these sums were paid out in strict conformity with the votes of Parliament and the needs of the services.

From the time that the King received a fixed income independent of the hereditary revenues, his interest in the business of the Treasury declined, and he ceased to preside at the Treasury Board. The rapid changes of ministry which took place between 1760 and 1770, and the immense cost of our participation in the Seven Years War, and of our struggle with the American colonies, seem to have relaxed Treasury control, and in other respects to have brought out the weak points of our financial system. The issue and expenditure of the revenue had ceased to be important to the King, and the Treasury had not realized its responsibilities to Parliament and the nation. So from 1760, or earlier, to 1780 our public service seems to have been a paradise for sinecurists and unscrupulous consumers of the public money, and their neglect of the Army and Navy contributed vitally to the loss of the American colonies.

The Civil Service was paid partly by charges on the Civil List, partly by fees—often exorbitant—received from those who had to do business with the public departments, or, where the business was concerned with the public money, by percentages on the sums dealt with. The Commissioners of Public Accounts appointed in 1780 found the Tellers of the Exchequer and Auditors of Imprest enjoying incomes of from

£10,000 to £15,000 a year, and doing nothing except by deputy. Then, and for many years after, colonial officers habitually left their duties to deputies and lived in England.

As regards the payment of the Army, Navy, and Ordnance it had become the custom to issue on demand to the Paymaster of the Forces, and the Treasurers of the Navy and Ordnance, the sums voted by Parliament for those services. The money remained in the hands of these officers till it was wanted, and the delay in rendering any account of its expenditure took away all semblance of Treasury control.

While Henry Fox, Lord Holland, was Paymaster of the Forces, from 1757-63, there passed through his hands more than forty-five millions of the public money. For fifteen years after he had left office he or his representative retained a balance, unaudited and unaccounted for, of £475,000. This sum was retained in view of possible claims which might be made upon Lord Holland by sub-accountants to whom the money might be due. It was in fact money voted by Parliament, and either not spent or not claimed by those who were entitled to it. Under such a system the Auditors of Imprest, even if they had been zealous in their vocation, might have found obstacles in their path. In this, as in other matters, the turning-point in the financial history of the last two hundred years is to be found in the appointment of the Commissioners of Public Accounts, who reported at intervals from 1780 to 1786, and in the contemporary legislation initiated by Burke.

By Acts passed in 1782-3 the abuses of the Pay Office were corrected, and a minister was no longer allowed to make a profit out of money granted for the public use.

At the same time began the gradual abolition of the practice of paying public servants by fees extracted from the pockets of those who had to do business with the departments of government, or by percentages on money on its way from the Exchequer to the payee.

The process of change in this respect seems to have been, first, the creation of a fee fund, consisting of the fees formerly paid to individuals and forming the fund out of which the salaries of the department should be paid, and then the payment of this fee fund into the general account of the Exchequer when the salaries became a fixed charge on the Consolidated



Fund, or a charge annually appearing on the votes—*Consolidated Fund Services* or *Supply Services*.

A better system of issue and audit made it more and more difficult for a public servant to make use of public money as it passed through his hands. The only persons who now get any benefit from the public money on its way from the pocket of the taxpayer to the pocket of the individual to whom Parliament has appropriated it, are the shareholders of the Bank of England, who enjoy the use of the Government balance in return for the service rendered as bankers by the Governor and Company of the Bank.

### *The Civil List*

Fees and percentages formed one mode of remunerating public servants; but their more regular emoluments were a charge upon the Civil List.

The Civil List is a term used sometimes to mean the annual income granted to the Sovereign to meet certain charges, sometimes to mean the charges thrown upon this income.

It originally meant the whole charge for civil expenditure, and to meet this charge the Commons in 1689 appropriated £600,000 out of the entire revenue of the country, including the hereditary revenues of the Crown, which at that time were estimated to produce about £300,000 a year. The charges on this fund consisted of the cost of the royal household, palaces, and gardens, the salaries of foreign ministers, of the judges, and of the civil service at home, together with pensions granted in this or the preceding reigns.<sup>1</sup>

The sums which came to the Crown for these purposes may be worth stating here.<sup>2</sup>

	1701. William III.	1713. Anne.	1726. George I.
	£	£	£
Hereditary and Temporary Excise . . . . .	413,075	439,008	513,703
Post Office . . . . .	75,258	92,008	95,273
Hereditary Revenue, small branches . . . . .	55,141	45,271	71,131
Additional Subsidy of tunnage and poundage . . . . .	297,070	253,679	279,142
Tax on Salaries (6 <i>d.</i> in the £) . . . . .	..	..	2,095
Grant from Aggregate Fund . . . . .	..	..	120,000
	840,544	829,966	1,081,344

<sup>1</sup> A list of these charges is to be found in *Parl. Hist.*, vol. v, App. xix, and in the Return of 1869, ii. 586.

<sup>2</sup> Return, 1869, ii. 594, 595, 597.

From these totals considerable deductions must be made. The financiers of the eighteenth century were wont to appropriate certain taxes to certain services, and then take part of them for other services. Thus they took £3,700 a week from the Excise produce, and another £700 from that of the Post Office, and applied it to general revenue. So the civil list income of Anne was not more than £590,000 in 1713, nor that of George I more than £813,844 in 1726.

When George II came to the throne Parliament guaranteed him an income of £800,000 a year if the hereditary revenues together with those provided by Parliament fell short of that sum; but the King was to take the benefit of any surplus which might accrue.

Thus when George III came to the throne provision for the Civil List had been made from three sources: the hereditary revenues; the additional taxes appropriated to the Civil List by Parliament; and a further sum which Parliament might be called upon to furnish if the two previous items did not amount to £800,000.

George III surrendered his rights to the hereditary revenues arising from the Crown lands, the Excise, and the Post Office. Parliament in return granted him an income of £800,000 a year. The King retained some small branches of hereditary revenue in England, and the hereditary revenues in Scotland and Ireland, and from time to time the amount of the income was increased by Parliament. But in spite of this, and in spite of a household economy which was almost penurious, the Civil List was frequently in debt.

Its insolvency gave Parliament an opportunity of regulating its expenditure. This was first attempted in 1782. The Civil List was divided into classes to be paid in a prescribed order:

1. Pensions and allowances to the Royal family.
2. Salaries of Lord Chancellor, Judges, and Speaker.
3. Salaries of ministers resident at foreign Courts.
4. Tradesmen's bills of the Household.
5. Salaries of menial servants of the Household.
6. Pensions.
7. Other salaries payable out of revenues of the Civil List.
8. Salaries and pensions of the Commissioners of the Treasury and Chancellor of the Exchequer.

The Treasury was given a practical interest in the receipts and payments of the Civil List. Its officers came last, so that unless there was vigilance over income and economy in expenditure they would not get paid at all.

In 1816 various payments to members of the royal family were transferred from the Civil List to the Consolidated Fund. George IV surrendered to Parliament the hereditary revenues of England and Ireland. William IV surrendered in addition the hereditary revenues of Scotland, besides certain Admiralty and Colonial sources of income. In return the Civil List of William IV was relieved of all public charges except £23,000 for secret service money. This practice has been carried farther in the ensuing reigns. The pay of public servants is now wholly removed from the Civil List, and appears on the votes or is charged on the Consolidated Fund, and their number and salaries are brought by various statutes under State control.

The payments on the Civil List<sup>1</sup> are now as follows:

	£
For Their Majesties' Privy Purse . . . . .	110,000
Salaries of the Household and retired allowances . . . . .	125,800
Expenses of the Household . . . . .	193,000
Royal Bounty and Alms . . . . .	13,200
Works . . . . .	20,000
Unappropriated . . . . .	8,000
	<hr/> 470,000

Further provision is made out of the Consolidated Fund for the younger sons of the King, married or unmarried (£25,000 and £10,000), for any Princess of Wales,<sup>2</sup> the King's daughter (£6,000 a year), and for the Queen should she survive the King (£70,000 a year). Civil list pensions, which may be granted in each year to the amount of £1,200, and which are a reward for public service, attainments in literature, or dis-

<sup>1</sup> It is noteworthy that during the last decade the growth in the proceeds from the Crown lands has been such that the amounts received annually are more than double (£1,230,000 in 1933-4) the total civil list payments. The surrender, therefore, is a definite source of profit to the State. In 1760 the net return was about £11,000.

<sup>2</sup> The Prince of Wales is provided for by the revenues of the Duchy of Cornwall. A Princess receives £10,000, and if surviving the Prince £30,000. Annuities are also drawn by the Duke of Connaught (£25,000), and the daughters of Queen Victoria and King Edward (£24,000 in all).

coveries in science, are no longer charged on the Civil List, but paid out of the Consolidated Fund.<sup>1</sup> The Prime Minister controls their award, and recommends the Poet Laureate whose emolument is only £99 a year.<sup>2</sup>

The Civil List accounts are not audited by the Comptroller and Auditor-General except the *item* of pensions. There is an Auditor of the Civil List, at present the Secretary of the Treasury. With this trifling exception the whole expenditure of the country is supervised and controlled by the Treasury in the interests of Parliament and the taxpayer rather than of the Crown. For Parliament not only determines how much shall be spent on the public service, but in what manner it shall be spent. And it is the business of the Treasury to take heed, firstly, by supervision of the estimates that the demands made upon Parliament by the King's ministers are not excessive, and, secondly, that the directions of Parliament as to issue and expenditure of public money are exactly fulfilled by the departments concerned. And in this last respect if we ask: 'Quis custodiet ipsos custodes?' the answer is prompt and effective, 'The Comptroller and Auditor-General'. Nor is it his fault that he cannot secure the wise allocation of funds. That is a matter for the Cabinet, which has unceasingly refused to accord to the Estimates Committee, which it permits the Commons annually to set up, the right to criticize policy and the expert aid necessary to enable it thus to act.<sup>3</sup>

<sup>1</sup> 10 Ed. VII and 1 Geo. V, c. 28, and see 1 & 2 Vict. c. 2; 1 Ed. VII, c. 4.

<sup>2</sup> Edward VII appears to have thought the post honorary; Lee, ii. 53.

<sup>3</sup> The functions of such a Committee, it is often suggested, would be incompatible with Cabinet responsibility for policy as at present understood. The constitution, however, is not inflexible, and may be moulded to meet emergent needs.

## CHAPTER X

### THE ARMED FORCES OF THE CROWN

THIS chapter has to do with the land, air, and sea forces of the Crown ; it would seem to fall into two sections, the first dealing with the mode in which these forces are composed and disciplined, and with the consequent *status* of soldier, airman, and sailor, the second dealing with the constitution of those departments of the central executive by which Army, Air Force, and Navy are governed. In both sections a brief historical outline will be necessary. The sections may be called respectively, (1) the Army, Air Force, and Navy, (2) the War Office, Air Ministry, and Admiralty.

Two features are common to the services and are characteristic of our constitution. The Land, Air, and Sea Forces of the Crown are recruited by voluntary enlistment ; conscription has no place, in peace, in our military, air, or naval system : and the ministers responsible to the King and to Parliament for the well-being and the efficiency of the Army, Air Force, and Navy are civilians, to whom the best professional advice is accessible, but who are rarely possessed of professional experience in any branch of the service.<sup>1</sup>

#### I. THE ARMY, AIR FORCE, AND NAVY

##### § 1. HISTORY OF THE MILITARY FORCES

Our military forces have varied in character, and their history falls into two distinct periods, divided by the Commonwealth. During the first of these there were two recognized forces, the feudal levy and the national levy : in addition to these the Crown was ever striving to possess itself of a third force, which should not be limited in its liability to service either by time, like the feudal levy, or as to place, like the national levy. The experience of the Commonwealth taught the nation what such a force might be, how efficient a standing army could be made, and how dangerous it might become to the liberties of the people.

<sup>1</sup> In the ministry of 1931 the First Lord of the Admiralty had had naval experience.

*The Feudal Levy*

The feudal levy, though not the oldest, may be dealt with first and briefly. It was the force which the King could raise by calling on tenants in chivalry to discharge the obligations of their tenure. It was a cavalry force, limited in its liability to service to forty days in the year.<sup>1</sup> When summoned, it was summoned like the *Commune Concilium* of the Charter: the great barons received a special writ, the lesser tenants-in-chief were summoned through the sheriff.<sup>2</sup> In 1159 this service was commuted for a payment of two marks on the knight's fee. Henceforth the money commutation became usual, until by the end of the fourteenth century it had fallen into disuse.<sup>3</sup> It was vainly convoked in 1639 by Charles I for his Scots war. In 1661 military tenures were abolished;<sup>4</sup> they had long possessed, in their burdensome incidents, a merely historical connexion with military service, and with their abolition the feudal levy became impossible.

*The National Levy*

The Saxon *fyrd* was a part of the *trinoda necessitas* which rested on all lands: it was the liability of every landowner to be prepared for summons to watch and ward, and under the new régime it won battles in 1138 and 1174. This defensive force was organized by Henry II in the Assize of Arms (1181), reinforced in 1252, and the Assize of Arms was in turn adapted to the circumstances of the time by the Statute of Winchester (13 Ed. I, c. 6). It existed for the maintenance of civil order and for purposes of military defence. It might be called out to suppress riot and pursue criminals, or to defend the country in case of invasion. The sheriff was responsible for its efficiency and summons; it was essentially a county force, not bound to service beyond the county except in case of invasion.<sup>5</sup>

The lieutenant of the county was substituted for the sheriff in the discharge of this duty, by 3 & 4 Ed. VI, c. 5,

<sup>1</sup> This is the term of service usually stated (Blackstone, *Comm.* ii. 75); but Dr. Stubbs says that 'from the statement contained in the writ of summons we get a somewhat indistinct idea of the limits of the feudal obligation'; *Const. Hist.* ii. 279.

<sup>2</sup> *Ibid.* 278.

<sup>3</sup> *Ibid.* 521.

<sup>4</sup> 12 Car. II, c. 24.

<sup>5</sup> This point, which had been disputed in the fourteenth century, was settled by Statute in 1402; 4 Hen. IV, c. 13.

which required all officers and inhabitants of the county to attend this new officer, when required, for the suppression of riot or rebellion. In the fourth year of Mary's reign the laws relating to the liability to keep arms and serve were consolidated,<sup>1</sup> but in the reign of James I these Statutes of Armour were wholly repealed.<sup>2</sup> None the less the general liability to military service remained, and the appointment of the lieutenants of counties, in whose control it lay, was the final cause of rupture between Charles I and the Long Parliament.

### *Armies before the Commonwealth*

But the levy for defensive purposes did not satisfy the requirements of Kings who wanted a force available, at once, anywhere, and for any time: and various modes were adopted to raise such a force. The liability to military service was used as a means of collecting men, sometimes under pressure by Commissioners of Array, and the levy, when collected, was used not merely to resist invasion from Scotland, in accordance with precedent, but for foreign war. This was frequently done by Edward I, who paid the levies for their service, and by Edward II, who threw the charge on the townships and counties whence the men came.<sup>3</sup> Such a practice was declared illegal by a series of Statutes from 1328 to 1402,<sup>4</sup> and the law was then clear: that no man could be constrained to find men-at-arms or archers unless he held his lands on the terms of such service, or else by force of grant and assent in Parliament; that no man could be required to serve out of his own county except in case of invasion; that volunteers who served the King abroad should do so at the King's cost.

The armies of Henry V were mainly composed of troops hired by the King himself, or raised by lords under indentures made with the King.<sup>5</sup> The Yorkist and Tudor Kings made pretext of invasion from Scotland to send Commissions of Array into the counties and call on men to serve, without consent of Parliament or payment by the Crown. The step

<sup>1</sup> 4 & 5 Ph. & M. c. 2.

<sup>2</sup> 1 Jac. I, c. 25, s. 7; 21 Jac. I, c. 28, s. 11, sub-s. 44.

<sup>3</sup> Stubbs, *Const. Hist.* ii. 284, 285.

<sup>4</sup> 1 Ed. III, st. 2, c. 5; 25 Ed. III, c. 8; 4 Hen. IV, c. 13.

<sup>5</sup> Stubbs, *Const. Hist.* iii. 540.

onwards to impressment was easy. The Tudors and Stuarts clearly regarded it as a prerogative of the Crown.<sup>1</sup> The Statute 16 Car. I, c. 28, declared impressment, or compulsion to serve outside the county, to be illegal, 'save in case of necessity of invasion or by reason of tenure'.

But, even if the King could manage to collect troops and could afford to pay them, they needed to be fed, lodged, and kept under discipline. The Petition of Right, 1628, made it illegal to quarter troops upon householders, and to issue commissions 'giving power and authority to proceed within the land according to the justice of martial law'.<sup>2</sup>

After the Restoration, and the abolition of military tenures, the national levy remained the only lawful armed force in the country. The King might raise troops by contract or voluntary enlistment, if he could afford to pay them, or if Parliament would grant him the necessary funds, but the maintenance of discipline was rendered practically impossible, because, unless troops were on actual service in war, the law permitted no departure from the settled rules which protected the liberty of the subject.

### *The Standing Army*

And the objections to the maintenance of a standing army had widened in character. Before the Commonwealth the requirements of military service had been regarded as oppressive to those who were required to serve; it was hard for the citizen to be made a soldier against his will. Cromwell's constitutional experiments involved a standing army, and his rule had taught the people that a standing army might be dangerous to national freedom. Henceforth the objections to a standing army are not so much that it involves hardship to the men who compose it, as that it is an instrument of despotism. The soldier is no longer an injured citizen, he is a danger to the state.

<sup>1</sup> 35 Eliz. c. 4 provides for the relief of soldiers disabled after being 'pressed and in paye for her Majesties service'. See, too, a reference to Shakespeare, *Henry IV*, pt. 1, act iv, sc. 2, in the *Manual of Military Law* published for the use of the War Office, and periodically revised. Cf. also A. H. Noyes, *The Military Obligation in Mediaeval England* (1930), p. 25, for impressment in 1282.

<sup>2</sup> 3 Car. I, c. 1, ss. 6, 7. The matters complained of seem to be an exten-



When the army of the Commonwealth was disbanded the King was permitted to retain guards for his personal attendance, and garrisons for the fortified places in the country.<sup>1</sup> Charles II and James II availed themselves of this permission to maintain considerable bodies of troops, and the government of their guards and garrisons was regulated by Articles wherein offences deserving death were reserved for trial by the ordinary courts.<sup>2</sup> But their armies were the subject of remonstrance and suspicion; and, when the Crown was offered to William and Mary, the Declaration of Rights laid down and the Bill of Rights, 1689, enacted that:

The maintenance of a standing army in time of peace without consent of Parliament is contrary to law.

There are then three obstacles to the maintenance of a standing army by the Crown without consent of Parliament. It is unlawful in time of peace; the necessary rules of discipline involve a departure from the ordinary law; and, under the existing method of granting supplies, the money needful to pay the troops would not be forthcoming.

But a standing army is required for our national security. It has therefore been legalized within the United Kingdom every year, for a year, with few breaks,<sup>3</sup> since 1689. This is done by the annual Mutiny Act, called since 1881 the Army Act, and now the Army and Air Force (Annual) Act, which also makes provision for the maintenance of discipline, continuously in the Regular forces, and in the Auxiliary forces at certain times and under certain conditions of service, for both the military and air forces of the Crown.

sion of the right of *purveyance*, which, after restraint by many Acts, was abolished by 12 Car. II, c. 24, s. 12. See Stubbs, *Const. Hist.* ii. 285, 535.

<sup>1</sup> As to the Ordinance, see *post*, pp. 224, 225, and Clode, *Military Forces of the Crown*, chs. i, xx. The King had also garrisons in Tangier and Bombay for a time.

<sup>2</sup> See, too, a letter from the Secretary at War to Col. Kirke, 21 July 1685, containing a direction that in all cases whatsoever where the punishment is to be loss of life or limb, the trial of any offender in His Majesty's pay 'be left to the Common State Law', the Articles of War being only to take place during the Rebellion that has now ceased; Clode, i. 478.

<sup>3</sup> The gaps in the series of Mutiny Acts are, 1689, 8 days; 1690, 2 months 20 days; 1698, 2 years 10 months; 1711, 4 months; 1713, 2 months 10 days; Clode, i. 390. Cf. *Parl. Hist.* xiv. 434 f.

## § 2. THE COMPOSITION OF THE MILITARY AND AIR FORCES

The military forces of the Crown consist of the *Regular* forces and the *Territorial and Reserve* forces: of the latter we will speak presently. The regular forces again are divided into Indian, Colonial, and British.

The Indian forces consist mainly of natives of India, but partly also of British officers and men serving in India. The latter are governed by the Army Act, the former by legislation passed by the Indian legislature.<sup>1</sup>

The Colonial forces may be (1) 'forces raised by order of His Majesty beyond the limits of the United Kingdom and India'<sup>2</sup>—these are substantially part of the regular forces and are governed by the Army Act—and (2) forces raised by the Government of a colony; these are subject to Colonial law: they only fall under the Army Act when serving with the regular forces, and then only so far as Colonial law may have failed to provide for their government and discipline.<sup>3</sup>

*(a) The Regular Forces*

But the British forces are, for our present purposes, the most important. They consist of the Army and the Royal Marines. The Army consists of cavalry, artillery, engineers, and infantry, besides what are called 'departmental corps', such as the Royal Army Service Corps and the Royal Army Medical Corps. The Royal Marines are a force of infantry

<sup>1</sup> See Government of India Act, s. 65 (1) (d). See especially the Army Act Amendment Act, 1934.

<sup>2</sup> Army Act, s. 176. The Royal Malta Artillery is such a force.

<sup>3</sup> *Ibid.* s. 177. The term 'colony' under 22 Geo. II, c. 22 no longer includes a Dominion. See Army Act, s. 190 (23, 23 A). But by s. 187 C the Army Act applies to the forces of Dominions which have not adopted the Statute of Westminster, 1931 (Commonwealth of Australia, New Zealand, and Newfoundland), as if they were colonies. The application to Dominion forces of Dominion legislation when in the United Kingdom is rendered possible by the Visiting Forces (British Commonwealth) Act, 1933. Presumably the presence by agreement of such forces would be held compatible with the limitation of forces prescribed in the Army and Air Force (Annual) Act, for the Act of 1933, s. 8, seems to contemplate that governmental assent would suffice. Danger of executive misuse of power is doubtless negligible in the eyes of Parliament. During the War of 1914–18 Dominion forces in and without the United Kingdom were subject to Dominion legislation which in the main applied the Army Act.

and artillery, first raised in 1755, and amalgamated as a single corps by Order in Council, 11 Oct. 1923; by Order of 10 Feb. 1919 a corps of Royal Marine Engineers was created. Their mode of enlistment and terms of service correspond with those of the soldier, and when they are not serving on board ship, under the Naval Discipline Act, their discipline is provided for by the Army Act. But the force is under the control of the Admiralty; its numbers are not fixed in the Army Act like those of the regular army, but appear on the votes which the House of Commons is asked to grant in Committee of Supply.

This brings us to the first point to note in respect of the regular army. Its numbers are fixed in the Army and Air Force (Annual) Act for each year, which, after reciting the necessity for maintaining a body of forces, states the precise number of men of which the force should consist, *'exclusive of the numbers actually serving within His Majesty's Indian possessions, other than Aden'*.

That this limitation of numbers may become of practical importance is shown by the vehement discussion which arose when, in 1878, Indian troops were ordered to Malta, and the right of the Crown to employ these troops outside India in time of peace was disputed.

It was argued that a force of a certain number of men was adjudged necessary by Parliament 'for the safety of the United Kingdom and the defence of Her Majesty's possessions', that the Indian troops were recognized as an additional force, 'actually serving within Her Majesty's Indian possessions', and that if the Queen might employ these troops elsewhere in her dominions, consistently with the terms of the Mutiny Act, there was no reason why she should not raise within her Indian possessions an army unlimited by Statute as to number, an army which 'she might move and dispose of without reference to Parliament'.<sup>1</sup>

The practical restriction on such an employment of the Indian army seemed then to be a clause in the Act for the government of India which forbade the expenditure of the revenues of India on military operations beyond the frontier of India, except in case of urgent necessity, without

<sup>1</sup> *Parl. Deb.*, 3rd Ser. ccxl. 194.

the consent of Parliament.<sup>1</sup> Thus, a ministry which employed Indian troops outside India must in the end ask Parliament either to find the money or to allow the Indian Government to do so, and must then justify its action. This was duly done as regards Indian troops employed in the war of 1914-18.

It is clear that to introduce such troops into the United Kingdom in time of peace without consent of Parliament would be unlawful, because the Army Act suspends the operation of the Bill of Rights only to the extent of the number of troops expressly provided by the Act. But the right of the Crown to dispose of this force freely elsewhere than in the United Kingdom must perhaps be regarded as an open question, since the highest legal authorities differed irreconcilably on this point in 1878.<sup>2</sup>

We have now to consider how the number of troops sanctioned by Parliament is raised by the Crown. We shall ignore the period of the war from 1916 when it was found necessary to impose compulsory service, all the legislation in question having now expired.<sup>3</sup>

Before 1783 this was effected by an arrangement between the colonels of regiments and the Crown. The colonel was empowered to raise recruits, and was bound to keep up the numbers of the regiment. He received a portion of the sum granted by Parliament, and made his own terms with the men.<sup>4</sup> There was no effective means of securing satisfactory returns for the cost. This practice was abolished in 1783,<sup>5</sup> when the Government took into its own hands the business of recruiting and the payment of the troops.<sup>6</sup>

<sup>1</sup> 21 & 22 Vict. c. 106, s. 55. This formal restriction is not included in the new Constitutional proposals.

<sup>2</sup> See the speeches of Lords Selborne and Cairns, of Sir John Holker and Mr. Herschell; *Parl. Deb.*, 3rd Ser. cxxl. 187, 213, 369, 515. See also p. 204, n. 3, *ante*.

<sup>3</sup> The operation of the system revealed much injustice, as men might be excused service for munition work, on which they earned high pay, while others were sent to the front on scant remuneration. The system of tribunals to deal with exemptions also worked badly.

<sup>4</sup> Clode, *Military Forces of the Crown*, i. 74; ii. 2-6.

<sup>5</sup> 23 Geo. III, c. 50.

<sup>6</sup> In time of war, even as late as 1854, noblemen and gentlemen agreed with the Crown to raise corps, on the terms that they obtained the nomination of some of the officers; Clode, ii. 5, 6. The practice would seem to have

The term of service for the rank and file was varied. Until a standing army was recognized by Parliament the engagement was for the war on hand. After that it was for life, unless the Crown discharged the soldier. Since 1847 service has been limited. Infantry were then engaged for ten years, cavalry for twelve, but the soldier might re-engage himself up to a term of twenty-one or twenty-four years.

The period of service for which the soldier now enlists is twelve years, or such less period as the King may from time to time determine. The provisions for extension of this term or change of conditions of service, of forfeiture of service for misconduct, and liability to transfer from one corps to another have been varied from time to time, but are now settled in the Army Act, 1881.<sup>1</sup> Enlistment is an engagement between the soldier and the Crown, and the soldier is entitled to the observance of the terms under which he enlisted, though these may have since been changed by Statute, subject, of course, to the power of Parliament to override in emergency existing rights of discharge.

This engagement is made not by acceptance of 'the King's shilling', but by attestation before a justice of the peace. The recruiting officer gives to the man who offers to enlist a form stating the terms of enlistment and the time and place at which he should appear before a magistrate. If, when he appears, he answers certain questions set forth in an attestation paper (the magistrate taking care that he understands their purport), signs a declaration as to the truth of his answers, and takes the oath of allegiance, he is then a soldier. The attestation has been required since 1694,<sup>2</sup> to ensure that the recruit understands the nature of his engagement; but he may still claim his discharge, if he change his mind within three months, on payment of a sum not exceeding £20. After that date he is bound to serve his time; but the Crown may discharge him at any time in virtue of its prerogative, or a

come from the time when lords and great men raised troops under indentures made with the King, as in the wars of Edward III and Henry V. Something of the sort prevailed under the Tudors. We find in the *Acts of the Privy Council* (iv. p. 132, 30 Sept. 1552) an entry of payments for bands of horsemen maintained by great nobles.

<sup>1</sup> 44 & 45 Vict. c. 58, ss. 76 ff.

<sup>2</sup> 5 & 6 Will. & Mary, c. 15, s. 2.

competent military authority may do so under statutory power.<sup>1</sup>

An officer in the Army or Navy is appointed by the receipt of his commission; he thereupon places himself at the disposal of the Crown; he cannot resign his commission without leave, and he is liable to be discharged at pleasure.

The question of the right to resign at will has arisen in the case of a military officer in the service of the East India Company (1769) and of an officer in the Navy (1887). In the former Lord Mansfield said, 'upon the general abstract question we are all of opinion that a military officer in the service of the East India Company has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases'.<sup>2</sup>

A more recent case is *ex parte Cuming*.<sup>3</sup> Lieutenant Hall, a lieutenant in the Navy, serving on one of the Queen's ships in commission, having asked leave of the Admiralty to resign his commission and having been refused, left his ship, sent his commission to his captain with an announcement of his intention to retire, and took a passage home in a mail steamer. On his arrival in England he was arrested by Captain Cuming, and detained as a prisoner with a view to his being tried before a court martial, under the Naval Discipline Act.<sup>4</sup> Captain Cuming was called on to show cause why a writ of *habeas corpus* should not issue and Hall be discharged. The Court held that Lieutenant Hall could not resign his commission in the mode which he attempted, and that he was rightly in custody.

'It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court martial for refusing to enter upon any particular service. Some of us as at present advised are of opinion that it would not. We leave the question distinctly open to be argued and decided if it should in any case hereafter be necessary to decide it. But we are clearly of opinion that, where a com-

<sup>1</sup> For the forms of enlistment, see 44 & 45 Vict. c. 58, s. 80; for power to discharge, s. 92. The Act of 1881 is by Statute reprinted annually, amended to date, as the Army Act.

<sup>2</sup> *Vertue v. Lord Clive*, 4 Burr. 2472.

<sup>3</sup> 19 Q.B. D. 13. See also *Hearson v. Churchill*, [1892] 2 Q.B. 144.

<sup>4</sup> 29 & 30 Vict. c. 109, s. 19.

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missioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Naval Discipline Act, and cannot at his own will and pleasure resign his appointment, and may be tried by court martial for any of the offences specified in the Act.'

*(b) The Territorial and Reserve Forces*

Until the Act of 1907 came into operation the Reserves and the Auxiliary Forces were distinct bodies, yet in some respects confused. The Reserve Force was provided under the Reserve Forces Act of 1882, and consisted, in part, of men who had served in the regular army,<sup>1</sup> and in part also of a militia reserve consisting of such militiamen as were willing to enlist as militia reservists for a prescribed period.<sup>2</sup>

The Auxiliary Forces consisted of the Militia, the Yeomanry, and the Volunteers.

The policy of the War Office, under Mr. Haldane, partly embodied in the legislation of 1907, was to constitute a fighting force on two lines; the first being the Regular Army, the striking force; the second the Territorial and Reserve Force, which should absorb the existing Reserve, the Militia, the Yeomanry, and the Volunteers. The Territorial and Reserve Forces Act, 1907, aggregated the various forms of local and auxiliary force under county associations, over which the Lord Lieutenants should preside, and to which, subject to the provisions of the Act, and to the plans and orders of the Army Council, belongs the task of organizing the Territorial Force, renamed since 1921 the Territorial Army.

The Militia represented the general levy, the control of which force, together with the appointments of lieutenants of counties, proved the final cause of quarrel between Charles I and the Long Parliament. The Restoration Parliament was careful to recognize the right of the King to the command of the Militia.<sup>3</sup> but it also required him to appoint lieutenants of counties throughout the kingdom, with power to commission officers, raise men, and organize training. Under these Acts the supply of men, horses, and arms was a liability resting on

<sup>1</sup> 45 & 46 Vict. c. 48.

<sup>2</sup> 45 & 46 Vict. c. 49.

<sup>3</sup> 13 Car. II, st. 1, c. 6.

property: and the practical control was vested in the Lord Lieutenant.<sup>1</sup>

When Mutiny Acts were passed, the Militia was exempt from them, and the force fell into inefficiency until its revival in 1757. In that year the old law was greatly changed. The liability to provide for the Militia became local. A statutory duty was laid on each county to provide a certain number of men; lists of all the men in each parish between the ages of 18 and 60 were sent to the Lord Lieutenant of the county. The quota of each district was settled, and the men who should serve were chosen by ballot. After the peace of 1815 the liability was relaxed. From 1829 onwards the ballot was suspended by Statute, unless the King should by Order in Council put it in force, and the Militia was reconstituted on a different footing in 1852.

It was thenceforth raised by voluntary enlistment, the ballot being kept in reserve in case the number of men provided by Parliament should not be forthcoming.<sup>2</sup> In 1855 it was taken from the control of the Home Secretary, under whose charge this force had always been until it was embodied. Henceforth the force was placed under the control of the Secretary of State, who by the Army Regulation Act of 1871 became responsible for the exercise of the powers of the Crown as regards the government, pay, and discipline of the Militia.<sup>3</sup> The Lord Lieutenants of the counties thenceforth only retained the right to nominate to first commissions. The Militia Act of 1882<sup>4</sup> consolidated most of the enactments which affected the force.

What then were the liabilities of the Militia? Enlistment took place in the same manner as that of the regular soldier. The recruit was required to undergo a preliminary training fixed by the regulations, and a subsequent training of from 21 to 28 days. The King might by Order in Council cause the Militia to be embodied in case of grave national danger, but the militiaman could not be required to serve out of the United Kingdom. Parliament, if not sitting, must be summoned to meet within ten days of such embodiment. When acting with the regular forces in their training or during

<sup>1</sup> 14 Car. II, c. 3; 15 Car. II, c. 4.

<sup>3</sup> 34 & 35 Vict. c. 86, pt. ii.

<sup>2</sup> 23 & 24 Vict. c. 120.

<sup>4</sup> 45 & 46 Vict. c. 49.



embodiment the militiaman was subject to military law. The militia officer was always so subject.

Under the Act of 1907 the Militia, as such, ceased to exist. But the Reserve Forces Act of 1882 was by the Act of 1907 extended in its operation to the enlistment of men, who had not served in the regular forces, as special reservists;<sup>1</sup> and the King received power by Order in Council to transfer battalions of the Militia to the Special Reserve. In 1921<sup>2</sup> the name of Militia was restored to the Special Reserve; and power to raise forces under the Act of 1882 finally disappeared. But the militia is at present in abeyance.

The Yeomanry and the Volunteers were alike in that they were bodies of volunteer troops, unlimited as to number, that the Crown was empowered by Statute<sup>3</sup> to accept their services, and that they were liable to be called out for military service in Great Britain in case of actual or apprehended invasion. But the Yeomanry was a cavalry force; the Volunteers were composed in part of light horse, artillery, and engineers, but mainly of riflemen. The Yeomanry were required to train for a certain number of days in each year in order to be effective: and during that time were subject to military law. The Volunteers were only subject to military law while being exercised with regular troops or with the Militia when the latter were so subject.<sup>4</sup> The Yeomanry might be called upon to suppress a riot: not so the Volunteers. Neither Yeomanry nor Volunteers existed in Ireland. Under the Act of 1907 both Yeomanry and Volunteers, or so many of them as were willing to join under the new conditions, passed into the Territorial Force. As a result of the war service of its members it was renamed Territorial Army by the Territorial Army and Militia Act, 1921, which repeals the power to raise Yeomanry.

The conditions referred to are set forth in detail in the Act, and it is enough here to note the armed forces which exist, or whose existence is contemplated, at the present time. We have first the Regular Army as described above. Behind the

<sup>1</sup> 7 Ed. VII, c. 9, s. 34.

<sup>2</sup> 11 & 12 Geo. V, c. 37, s. 2.

<sup>3</sup> 44 Geo. III, c. 54. The Act applied to volunteer infantry, but was repealed as to these by the Act of 1863 (26 & 27 Vict. c. 65), which with the Regulation of Forces Act, 1881 (44 & 45 Vict. c. 57, s. 9) governed the Volunteer Corps.

<sup>4</sup> 44 & 45 Vict. c. 58, s. 176.

Regular Army is the Reserve, constituted under the Reserve Forces Act of 1882, of men enlisted into the Reserve who have already served in the regular forces, and of the Special Reserve of the Act of 1907, now renamed the Militia. Of this Reserve, which in 1934-5 was still in abeyance, some enlist on the terms that they may, and some that they may not, be called upon to serve outside the United Kingdom. But the calling out of the Reserves, other than the Special Reserve,<sup>1</sup> involves the immediate summons of Parliament if Parliament is not sitting at the time,<sup>2</sup> in order that the crisis which has necessitated the calling out of the Reserves may be explained to the two Houses.

Beyond the Reserve is the Territorial Force, liable to serve in any part, but not outside, of the United Kingdom. This force is organized in every county by an association, formed for the purpose under the presidency of the Lord Lieutenant, with power to make the necessary arrangements under the guidance and control of the Army Council. The Associations are concerned with recruiting, provision of ranges, buildings, and manœuvre areas, and submit annually a statement of requirements to the Army Council which allocates such sums as it deems fit. The Council has power to make regulations on a variety of topics; they must be laid before Parliament.<sup>3</sup>

Recruiting is carried on somewhat on army lines; attestation being similarly required. The term of service is not to exceed four years. A man may be dismissed by his commanding officer at his discretion, subject to appeal to the Army Council.<sup>4</sup> Commissions are granted on the advice of the President of the County Association. An enlisted man may, except when the Army Reserve is called out, purchase his discharge on three months' notice, but, if the Reserve is called out, he may be required to prolong his service for twelve months. Recruitment is primarily for home service, but recruits may agree to serve abroad, and now normally do so.<sup>5</sup> Members of the force undergo short periods of training, the control of Parliament as regards any extension being assured.<sup>6</sup>

Embodiment of the force is permitted to the Army Council

<sup>1</sup> 7 Ed. VII, c. 9, s. 32.

<sup>2</sup> 45 & 46 Vict. c. 48.

<sup>3</sup> 7 Ed. VII, c. 9, s. 4.

<sup>4</sup> Ibid. s. 9 (4).

<sup>5</sup> Ibid. s. 13.

<sup>6</sup> Ibid. s. 17.

when the Army Reserve is called up for service, but in this case also Parliament is given full control over the embodiment, and must if not sitting be summoned if it is not due to meet for ten days or longer. Failure to attend drills without leave or reasonable excuse involves liability to a fine on summary prosecution. On embodiment failure to report constitutes desertion for which the offender may be tried by court martial. Non-commissioned officers and men become subject to military law when being trained, or when attached to regular forces, or when embodied, or when called out for actual military service in pursuance of any agreement.<sup>1</sup> Officers and men alike enjoy minor privileges such as exemption from jury service, and holding a commission is no barrier to sitting in the House of Commons.<sup>2</sup>

### (c) *The Air Force*

The existence of an Air Force as an independent branch of the defence services was the result of experience in the war of 1914–18. Originally the Royal Flying Corps and the Royal Naval Air Service were attached to and under the control of the Army Council and the Admiralty respectively. But under the aegis of the Air Board under Lord Cowdray, appointed for the purpose of securing the supply of machines,<sup>3</sup> it was found possible to collect so large a number of aeroplanes that the formation of a distinct branch of the service became both desirable and possible. Hence the Air Force Constitution Act, 1917,<sup>4</sup> provides for the establishment of an Air Council and for the constitution, administration, and discipline of an Air Force. The easy mode was adopted of permitting by Order in Council the application to the Air Force of the rules governing the Army under the Army Act, and accordingly the constitutional principles applicable to the Army are in full force as regards the Air Force. The Manual of Military Law has been used as the base of the Manual of Air Force Law, and the King's Regulations for the Royal Air Force are largely transcribed from the corresponding Regulations for the Army.

<sup>1</sup> Army Act, s. 176 (6 A); as to officers, see s. 175 (3 A).

<sup>2</sup> 7 Ed. VII, c. 9, s. 23.

<sup>3</sup> 6 & 7 Geo. V, c. 68, s. 7.

<sup>4</sup> 7 & 8 Geo. V, c. 51; 24 Geo. V, c. 5.

Similarly, in 1924<sup>1</sup> authority was given for the creation of an Air Force Reserve analogous to the Army Reserve, and an Auxiliary Air Force to correspond in some measure with the Territorial Army. Very considerable importance has been attached to this latter force as a means of aiding in securing the defence of the country against air attack.

Constitutionally the control of Parliament over the force is assured by the rule that the Air Force Act is treated like the Army Act and continued as operative from year to year by the Army and Air Force (Annual) Act.<sup>2</sup>

(d) *The discipline of the Army and Air Force*

Troops on active service were from an early date in our history governed by Articles of War, issued by the King himself or by an officer commissioned by him. They were administered in the Court of the Constable and Marshal, which, as Hale tells us,<sup>3</sup>

'dealt with the offences and miscarriages of soldiers contrary to the laws and rules of the army: for always *preparatory to an actual war* the Kings of this realm by advice of the Constable and Marshal were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers together with certain penalties on the offenders; and this was called Martial Law.'

This jurisdiction was probably exercised, where the Constable and Marshal were not present, by officers in military command in virtue of commissions from the Crown, and was unaffected when the office of High Constable became extinct;<sup>4</sup> from these commissions grew the courts for dealing with offences so created, which we know as *courts martial*.

But Articles of War, as is indicated by the words in italics, were only in force in actual war. When a military force was

<sup>1</sup> 14 & 15 Geo. V, c. 15; S.R. & O., 1924, No. 1213.

<sup>2</sup> So the Act of 1934 (24 Geo. V, c. 11) fixes the Air Force at 31,000 as a maximum.

<sup>3</sup> Hale, *History of the Common Law*, p. 40.

<sup>4</sup> The Court continued for a time to deal with questions of procedure and the right to bear heraldic armour, but it was ruled in *Chambers v. Jennings* (1702), 7 Mod. 125, that, there being no Constable, it was not duly constituted, and *Sir H. Blount's Case* (1737), 1 Atk. 296 is the last recorded. The College of Arms or Heralds' College is all that remains.

made lawful by the Mutiny Acts it was necessary to secure discipline under all conditions of active service, war, or peace. For insubordination there was no remedy except when troops were on active service in time of war, and, though desertion had been made a felony in the case of men under contract or indenture to serve the Crown,<sup>1</sup> the deserter could be punished only in the ordinary courts.

The first Mutiny Acts were intended to do no more than supplement the prerogative right to make articles of war *in time of war*; they made mutiny and desertion punishable with death, and gave a statutory power to the Crown to commission courts martial to deal with such offences in the case of troops not on active service. They did not give to the King the power to make articles of war, that is, a special code of offences and punishments, beyond his existing prerogative, and applicable alike in time of war and peace. But the Mutiny Acts of 1715 and subsequent years gave power to the King to make articles of war for the troops in the United Kingdom and in his other dominions *in time of peace*; and after 1803 this power was extended to troops outside the dominions of the Crown, and so covered the case of troops on active service, substituting statutory authority for prerogative.

Thus the prerogative of the Crown was embodied and extended in the statutory powers conferred by the Mutiny Acts, and in virtue of these powers were articles of war made and enforced in peace and war until 1879.

In that year the provisions of the Mutiny Act and of the Articles of War were consolidated into a code of military law.<sup>2</sup> This code was amended in 1881 and is now re-enacted every year, for one year, under the title of the Army and Air Force (Annual) Act.<sup>3</sup> When the Air Force, as such, was constituted, the simple plan was adopted of authorizing the Crown to

<sup>1</sup> 7 Hen. VII, c. 1, s. 2; 3 Hen. VIII, c. 5; 4 & 5 Ph. & M. c. 3, s. 9.

<sup>2</sup> For an account of the circumstances which led to this codification of military law, see the speech of Colonel Stanley introducing the Bill; *Parl. Deb.*, 3rd Ser. cccxliii. 1910.

<sup>3</sup> The effect of the substitution of the present Army Act for the old Mutiny Act is to bring the entire code of military law annually under the consideration of Parliament, which no longer gives power to make rules and constitute Courts, but enacts the rules, provides the jurisdiction for enforcing them, and the punishments for their breach.

construct for it a parallel code, the Air Force Act.<sup>1</sup> It is worth while to note some features of this Act.

(1) The preamble recites the clause of the Bill of Rights directed against the raising or keeping a standing army in the time of peace, and proceeds to recite the necessity, for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, that a body of land forces should be continued, and that it should be of a certain number (149,500 for 1934), exclusive of those serving in India (excluding Aden), and also a body of marines.

(2) It then recites the provisions of mediæval statutes that 'no man can be forejudged of life or limb or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of the realm', and proceeds to state the necessity, 'for retaining the *before-mentioned forces and other persons subject to military law* in their duty, that an exact discipline be observed', and that persons who act to the prejudice of good order and military discipline 'be brought to a more exemplary and speedy punishment than the usual forms of the law will allow'.

(3) It then re-enacts the Army Act for specified times in the British Isles and elsewhere, both within and without the British dominions.

Even since the Statute of Westminster, 1931, those Dominions to which the Statute applies<sup>2</sup> are affected by the Army Act in so far as it applies to any Imperial forces which may therein be lawfully stationed.

(4) The Act applies to all persons subject to *military law*, and these are not limited to the number of men specified in the preamble. They include the marines when not subject to the 'laws relating to the government of His Majesty's forces by sea', the British troops serving in India, and, under statutory conditions as to time and circumstances, the other

<sup>1</sup> 7 & 8 Geo. V, c. 51, s. 12.

<sup>2</sup> Canada, the Irish Free State, and the Union of South Africa. Canada and the Union have legislated on the lines of the Visiting Forces (British) Commonwealth Act, 1933, to regularize, from the point of view of the Dominion law, the exercise of jurisdiction under the Army Act over British forces present in the Dominion by agreement. Cf. Keith, *Journ. Comp. Leg.* xv. 255, 256.

armed forces of the Crown within and without the King's dominions.

### § 3. THE COMPOSITION AND DISCIPLINE OF THE NAVY

The Navy, unlike the Army, has never been suspected by the Legislature. Its existence has been taken for granted. The maintenance of its numbers by the arbitrary mode of impressment has never been declared unlawful,<sup>1</sup> though the exercise of this prerogative would undoubtedly be called in question if brought into use at the present day. The numbers of the naval force are therefore fixed by the requirements of the Admiralty as determined by the Cabinet, sanctioned by the Chancellor of the Exchequer, and met by vote of the House of Commons.

Like the soldier, the sailor engages himself to the service of the Crown for a certain time, but may be dismissed before that time has expired.

Like the officer in the Army, the officer in the Navy, when he accepts a commission from the Admiralty, places himself at the disposal of the Crown; his services may be dispensed with, but he cannot terminate them at his own pleasure.

The discipline of the Navy was maintained, in its origin, by orders issued from time to time by the admiral of the fleet in virtue of royal orders or a royal commission. The first Lord High Admiral of England was Sir Thomas Beaufort in 1408. Until that time the command of the various fleets had not been entrusted to one man, nor indeed was the fleet a regularly organized institution. The Cinque Ports were liable for the defence of the narrow seas, and beyond this, fleets were collected, manned, and disciplined as occasion might require.

The jurisdiction, both civil and criminal, in maritime causes of the Lord High Admiral and his Court may be dealt with hereafter; it is wholly distinct from the code of rules passed for the maintenance of discipline.

Under the Tudors the Navy became a permanent force, belonging to the Crown and governed by the Crown. In the reign of Charles I the office of Lord High Admiral was for the first time put into commission. The sailors who manned the fleet were governed by regulations made, in virtue of the

<sup>1</sup> See *R. v. Broadfoot* (1743), Foster 154.

royal prerogative, by the admiral in command, enforced by the captains under his instructions, and neither seen nor approved by Parliament.

The first attempt to organize the discipline of the Navy on a statutory basis was made by the Long Parliament:<sup>1</sup> and under the Commonwealth ordinances were drawn up and the constitution of naval courts martial was carefully framed so as to include all ranks.<sup>2</sup>

After the Restoration, Parliament retained its control over naval discipline. In 1661 was passed an Act for establishing discipline in the Navy. The Act<sup>3</sup> defines a number of offences and their punishments, and gives power to the Lord High Admiral to issue commissions for holding courts martial, limiting the jurisdiction to offences on the high seas, or in great rivers below bridges, committed by persons in actual service in the King's fleet. In 1748 and 1749 these rules were amended in some respects, and extended to shipwrecked crews, and to offences, under the Acts, committed on shore out of the dominions of the Crown. Changes have been made from time to time in this code of discipline and procedure for the Navy, but as a whole it has remained a permanent Statute. Parliament has never feared to contemplate the continued existence of the Navy, and hence the contrast between the temporary character of the Mutiny Act and the permanence of the Naval Discipline Act. The law which now governs the Navy is the Naval Discipline Act of 1866, which is reprinted as amended from time to time.<sup>4</sup> Part I of this Act is described as consisting of *articles of war*; a sailor therefore, like a soldier, may be regarded as a person subject to military law.

#### § 4. PERSONS SUBJECT TO MILITARY, AIR FORCE, AND NAVAL LAW

The soldier and sailor alike are subject to the ordinary law of the land. While within the jurisdiction of the ordinary

<sup>1</sup> *Lords' Journals*, vii. 255.

<sup>2</sup> Thring, *Criminal Law of the Navy*, p. 31.

<sup>3</sup> 13 Car. II, c. 9.

<sup>4</sup> See 47 & 48 Vict. c. 39, s. 6; 61 & 62 Vict. c. 36, s. 2 (a); 9 Ed. VII, c. 41; 1 & 2 Geo. V, c. 47; 5 & 6 Geo. V, cc. 30, 73; 7 & 8 Geo. V, c. 34; 12 & 13 Geo. V, c. 37; 17 & 18 Geo. V, c. 8, ss. 1 (4), 3. The legal position of colonial naval forces is regulated by 21 & 22 Geo. V, c. 9. For the Dominions see 1 & 2 Geo. V, c. 47; 12 & 13 Geo. V, c. 37; p. 93, *ante*.



courts they can be tried and punished for offences against the criminal law, they can be sued for liabilities<sup>1</sup> incurred under the civil law, and they acquire no immunity by reason of their engagement in the service of the Crown.

But the criminal law of this country follows them into places where it would not reach other subjects of the Crown: for it may be administered by courts martial within and without the jurisdiction of the Courts. This power of administering the ordinary criminal law is limited by the rules that certain offences (murder, manslaughter, treason, felony, and rape) may not be tried by court martial, if committed in the United Kingdom, or if committed out of the United Kingdom but within the dominions of the Crown, unless the offender is on active service or the offence be committed 100 miles or more from a competent civil court: and that under no circumstances can a court martial oust the jurisdiction of the civil courts over such offences.

And in addition to a liability to the criminal law of the land, which is more extensive than that of the citizen, the Army Act, the Air Force Act, and the Naval Discipline Act provide for the soldier, airman, and the sailor rules of conduct and a procedure for their enforcement different in character from the rules and procedure of the ordinary law.

The soldier, airman, and sailor are therefore *persons subject to military law*.<sup>2</sup> They are liable to arrest and confinement on being charged with an offence against that law, and pending investigation, and, if below a certain rank in either service, may be punished for minor offences under summary powers possessed by officers in command.<sup>3</sup>

<sup>1</sup> But the soldier cannot be arrested or compelled to appear before a court on account of any debt, damages, or sum of money not over £30. The creditor may sue and get execution of the soldier's goods so long as he does not deprive the Crown of the soldier's services or touch the person, pay, military equipment or clothing of the soldier. See Army Act, s. 144; Air Force Act, s. 144.

<sup>2</sup> It is merely necessary here to call attention, and no more, to the distinction between military law and what is called 'martial law'. Military law is the code under which the soldier and the sailor live, and to which they subject themselves during such time as they continue in their professions. Martial law is nothing more than an extension of the right to the use of force for purposes of self-protection. See on this point *Phillips v. Eyre* (1870), L.R. 6 Q.B., pp. 15, 16, and i. 315 *ante*.

<sup>3</sup> This power exists as to soldiers partly under s. 45 of the Army Act,

For offences against military law they are triable by courts martial the offences so triable and the procedure in respect of them are carefully defined in the Acts to which we have referred. But courts martial are strictly limited to the powers conferred upon them by Statute, and the relation of the Law Courts to them in this respect must be noted.

Persons administering military law may exceed their jurisdiction in two ways. They may apply military law to persons not subject to that law. Or they may misapply military law in cases of persons who are subject to it—as if a soldier were tried by court martial for murder in the United Kingdom, or the sentence of a court martial were confirmed by an officer who had no authority to confirm it.

The remedies for such excess of jurisdiction are in part by writs of Prohibition, of Certiorari, of *habeas corpus*, issuing from the High Court of Justice. The holding of a trial or the infliction of a sentence may be restrained by a writ of Prohibition; a sentence may be quashed or a matter brought up to the High Court to be dealt with by writ of *certiorari*; one who is deprived of his liberty wrongfully may recover it by writ of *habeas corpus*. Beyond this the Courts will give a remedy in damages to persons who have suffered by the application of military law without jurisdiction.

The cases may be thus grouped under three heads: (1) the case of a civilian tried and punished by military law; this is clearly illegal, but the statutory provisions to secure validity of enlistment,<sup>1</sup> either in peace or in war,<sup>2</sup> now normally prevent such cases arising; (2) the case of a person subject to military law punished without trial or tried and punished without jurisdiction;<sup>3</sup> and (3) cases in which jurisdiction exists but the plaintiff alleges that the law has been put in

partly under the King's Regulations in respect of minor punishments, such as confinement to barracks, &c. There are like provisions under the Air Force Act. As to sailors, it is authorized by the Naval Discipline Act, s. 56 (2); see 47 & 48 Vict. c. 39, s. 1 (2). In war-time disciplinary courts may be set up to punish offences by naval officers; see 5 & 6 Geo. V, c. 73, s. 2.

<sup>1</sup> See Clode, *Military Forces*, ii. 8, 587.

<sup>2</sup> Army Act, s. 100 (1), (2), (3); Air Force Act, s. 100 (1), (2), (3).

<sup>3</sup> *Heddon v. Evans* (1915), 35 T.L.R. 642; *Warden v. Bailey* (1811), 4 Taunt. 67. The Courts will not interfere because a court martial errs in admitting or rejecting evidence or misinterprets law; *R. v. Murphy*, [1921] 2 I.R. 190.

force against him either without reasonable cause or wrongfully and maliciously.

As regards these last it is well to seek some general rule, and the rule may be thus stated. Where an officer in the exercise of his discretion and in the course of his duty brings before a military tribunal a person who is subject to military law, courts of law will not inquire into the reasonableness of the charge, even though it should have been proved at the trial to be unfounded.

Captain Sutton was ordered by his commanding officer, Commodore Johnstone, when in sight of the enemy, to slip his cable and engage the French fleet. He disobeyed this order, and Johnstone brought him before a court martial. It was there proved that his disobedience was not wilful but arose from the condition of his ship, which made his obedience to the order a physical impossibility. He was therefore honourably acquitted. He brought an action against Johnstone and obtained a verdict for £6,000 damages,<sup>1</sup> which was sustained in the Court of Exchequer on a motion for arrest of judgment. But this decision was reversed in the Court of Exchequer Chamber, mainly on the ground that the defendant had 'probable cause' for bringing the plaintiff to trial. But the Court went farther, and expressed an opinion that even if the proceedings in the court martial had been instituted without probable cause, courts of law would not interfere with the discretion of an officer acting in a matter of discipline.

It remains to consider the position of a person subject to military law against whom proceedings are instituted not merely without probable cause, but with malice. On this point we may state the law to be as follows.

The general rule which protects witnesses from action for defamatory statements made in the course of their evidence applies to evidence given before courts martial. And further, the Courts will not interfere even where the discretion of an officer has been influenced in its exercise by a malicious motive.<sup>2</sup>

Lord F. Paulet in the course of his duty made statements concerning Colonel Dawkins which were intended to be for-

<sup>1</sup> *Sutton v. Johnstone* (1786), 1 T.R. 541.

<sup>2</sup> *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 251; 7 H.L. 744.

warded to the Commander-in-Chief.<sup>1</sup> Colonel Dawkins brought an action for defamation, alleging that these statements were not merely false but malicious. The case for the defence was argued upon a demurrer, that is to say, the truth of the allegations was not traversed; but it was maintained that the statements, even though false and malicious, disclosed no cause of action because they were made in the course of military duty. This view was sustained by the majority of the Court: but some weight was given to a provision in the articles of war,<sup>2</sup> that an officer who considers himself to be wronged might complain to the Commander-in-Chief. There was therefore a military remedy for the breach or misperformance of a military duty. It may be open to question<sup>3</sup> whether the Courts would not find a remedy for an abuse of military procedure which was proved or admitted to be malicious, if the Army Act, Air Force Act, and Naval Discipline Act had not provided one.

## II. THE WAR OFFICE, AIR MINISTRY, AND THE ADMIRALTY

### § 1. THE GOVERNMENT OF THE ARMY BEFORE 1855

Before the Crimean war, and the changes in military administration to which that war gave rise, the control of the Army, and of the appliances necessary to an army, exhibited a medley of conflicting jurisdictions. The system was almost unmanageable in time of war, but was supposed, in its dispersion of duties and powers, to ensure that the Army was not dangerous to the constitution.<sup>4</sup>

(1) The Commander-in-Chief was responsible to the Crown for the discipline of the Army, for appointments, promotions, rewards and punishments.

(2) The Secretary at War, who was not a Secretary of State nor often a member of the Cabinet, was responsible to Parlia-

<sup>1</sup> L.R. 5 Q.B. 94.

<sup>2</sup> This provision is now introduced into the Army Act, s. 42, and the Air Force Act, s. 42. It is to be found also in the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 37.

<sup>3</sup> Cf. Ridges, *Constitutional Law of England* (ed. Keith), p. 357.

<sup>4</sup> The first chapter of Sir Robert Biddulph's *Lord Cardwell at the War Office* sets out somewhat more fully the confusion of authorities which prevailed in 1854.

ment for the money voted for the Army, for the security of the citizen against the soldier in person and property, and for the security of the soldier in respect of the fairness of the rules of military discipline which were embodied in or issued under the authority of the Mutiny Act.

(3) The Secretary of State for the Home Department was responsible for the Reserves and for the forces on the Home Establishment.

(4) The Secretary of State for War and the Colonies was responsible for the numbers of the Army, for the general policy respecting it, and for the movement of troops on foreign or colonial service.

(5) The Ordnance Board was a separate department, usually represented in Parliament by the Master-General of the Ordnance, and responsible for the defences of the country, and for Army and Navy stores.

(6) The Commissariat was a department of the Treasury.

(7) The Board of General Officers, appointed by Royal Warrant in 1714, attended to the clothing of the Infantry and Cavalry.<sup>1</sup>

The soldier, therefore, was fed by the Treasury, and armed by the Ordnance Board, while the Board of General Officers was responsible for the pattern of his clothing: the Home Secretary was responsible for his movements in his native country: the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and that the flogging which was provided for him by the Commander-in-Chief was administered in accordance with military law.

The confusion of authorities was partly due to the desire of the Crown to retain, on the score that it was a vital royal prerogative,<sup>2</sup> or as a source of political influence, the prerogatives which it enjoyed in respect of the standing army, but mainly to the halting and reluctant steps by which the country admitted the standing army to be a part of its constitution. Any attempt by ministers to harmonize these conflicting elements was liable to be met by objections from two quarters.

<sup>1</sup> Clode, *Military Forces of the Crown*, ii. 568.

<sup>2</sup> Queen Victoria insisted throughout her life on this point of view; cf. her views in 1893; *Letters*, ii. 504 ff.

The Crown was unwilling to subject its prerogatives to Parliamentary control; the Commons objected to the admission that a standing army was more than a temporary necessity.

But forasmuch as for nearly 250 years Parliament has, with few breaks, legalized the existence of a standing army, provided for its discipline, voted money to pay for it, and taken care that this money is applied to the purposes for which it is voted, we may accept the Army as a permanent institution, and ask, Who is responsible for its numbers and disposition, for the maintenance of its discipline, for asking Parliament for the necessary funds, and for their proper expenditure?

To understand the present highly centralized organization of the War Office, we must work through the political departments which have been merged in it. They are four: the Ordnance Board; the Commissariat, as a branch of the Treasury; the office of Secretary at War; and that of Secretary of State, in so far as it was concerned with military matters. We must also note the various difficulties created by the office of the Commander-in-Chief.

#### (a) *The Ordnance Board*

The Ordnance Board should come first, as being the oldest of the military departments.<sup>1</sup> The *Ordnance* meant the defence of the country by means of fortresses, garrisons, and stores, these last being applicable alike to the Army and Navy. The right—the sole right as claimed in Magna Carta—to maintain defensive works, such as castles and forts, was an undisputed branch of the royal prerogative: forts need guns, ammunition, and men, and the employment of these was a part of the discretionary power vested in the Crown for national defence. The Board was wholly separate from and independent of the office of Secretary at War, and separately responsible to Parliament for the money voted to its use. At the head of the Board was the Master-General of the Ordnance, an important member of the Government throughout the eighteenth century,<sup>2</sup> and its chief adviser in military matters. He was Commander-in-Chief of the artillery and

<sup>1</sup> See as to the history of this Board, Clode, *Military Forces of the Crown*, i. 8; ii. 264 ff.

<sup>2</sup> In 1740 his office was considered naturally a Cabinet post; Turner, *The Cabinet Council*, ii. 28.

engineers, and presided at the Board of Ordnance, the duties of which had widely expanded since they were reorganized and defined in the reign of Charles II.

These duties were at first limited to the charge of the King's forts for national defence, of the guns and stores for their use, and for the Navy. As the Army became a permanent and an increasing factor in the national expenditure, the business of keeping the necessary stores and entering into contracts for their supply grew in importance. The Board started in business on its own account, and established factories for the foundry of guns, the making of carriages, the supply of powder and of small arms. Then, too, it held on behalf of the Crown the sites of the royal forts, and during and after the reign of Anne received from time to time statutory powers for the acquisition of land for purposes of national defence. To the Ordnance Department also fell the duty of making an authoritative survey of the United Kingdom, a duty later transferred to the Board (now Ministry) of Agriculture.

These duties were transferred early in 1855 to the Secretary of State for War, while the Commander-in-Chief took over the command of the artillery and engineers: the Board, as a separate department, ceased to exist, and its Parliamentary powers were vested by Statute 'in the Principal Secretary of State, to whom the Queen has entrusted the Seals of the War Department'.<sup>1</sup>

#### *(b) The Secretary at War*

The office of Secretary at War dates from the reign of Charles II. Until the commencement of the nineteenth century its duties were ill defined, and their ambiguity is doubtless owing to the different points of view from which the Army was regarded by the Crown and by Parliament.

In the reigns of Charles II, James II, and William III, the Secretary at War, though appointed by commission and not by delivery of seals, acted in some respects as a Secretary of State. His counter-signature authenticated the sign manual, and this on state papers which had not to do with the Army.<sup>2</sup>

But the Secretaries of State increased in power as Cabinet

<sup>1</sup> 18 & 19 Vict. c. 117.

<sup>2</sup> Clode, *Military Forces of the Crown*, ii. 255. W. Blathwayt held this

Government developed: not so the Secretary at War. And the difference is instructive. The united action of political leaders in Cabinet Government, and the tenure of office subject to the support of a Parliamentary majority, changed the Secretary of State from a mere mouthpiece of the Crown or the Privy Council into the independent head of a department responsible to Parliament as well as to the King for the discharge of the duties of his post.

But the Secretary at War did not enjoy the complete responsibility to Parliament which enhanced the position of the Secretary of State. The terms of his commission enabled him to contend that he was the servant of the King, or of the General of the Forces for the time being; that he was bound to carry out the orders given to him by his master, and was not bound to account to Parliament for what was done.<sup>1</sup> It did not suit either the King or those who professed most anxiety for the liberties of the people to enforce the Parliamentary responsibility of the Secretary at War. The one did not desire to see the exercise of his military prerogatives brought under the supervision of Parliament; the other would gladly be rid of the office and the Army as well. The popular statesmen of the first half of the eighteenth century would have considered that in making the Secretary at War accountable to Parliament they were recognizing a standing army as a permanent part of the constitution.

During the greater part of the eighteenth century the business of the Secretary at War was to communicate the King's pleasure in matters of military administration, to prepare for the King's signature and to countersign warrants on the authority of which the Treasury paid over to the Paymaster of the Forces the money voted by Parliament for the

office as William III's servant, not adviser, as under James II and Anne (1683-1704); ii. 690-3. From 1704 the Secretary at War virtually became the civil head of the War Department; Fortescue, *Hist. of British Army*, i. 410; ii. 21 ff.

<sup>1</sup> Pulteney in 1749 justified his action, in respect of the officers in Preston, on the ground that as Secretary at War he was 'a ministerial not a constitutional officer, bound to issue orders according to the King's direction', and so defended an execution of officers after the rebellion of 1715 which he ought to have known at the time to be of doubtful legality, and which was in fact illegal. He did not, however, assert the right to carry out an order patently illegal; *Parl. Hist.* xiv. 479.



maintenance of the Army. But in 1783 a definite Parliamentary responsibility was for the first time imposed upon the office.<sup>1</sup> Burke's Act required the Secretary at War to prepare estimates for Parliament in each year, to transmit the money when voted to the Paymaster of the Forces, and to receive and settle annually the accounts of expenditure. Then the revival in 1793 of the office of General Commanding-in-Chief<sup>2</sup> and in 1794 the appointment of a third Secretary of State for War vitally affected his position.

The establishment of a permanent Commander-in-Chief meant that the King gave up the personal command of the Army: it meant also that in all matters relating to the internal discipline and regulation of the Army the royal pleasure would henceforth be communicated, not by the Secretary at War, but by the Commander-in-Chief. From this time arose the dual control of the Army: the Horse Guards, side by side with the War Office.

What the Secretary of State for War took from the hands of the Secretary at War is not easy to define. It is generally described by Lord Palmerston as 'business of a political nature which was formerly transacted in the War Office'.<sup>3</sup> Probably the Secretary at War had been used to submit to the Cabinet the proposed number and employment of the forces: these matters were henceforth settled by the Secretary of State, who left to the Secretary at War merely the preparation of estimates upon instructions received from the Cabinet. No doubt also, in the absence of any official of Cabinet rank responsible for the conduct of the War Office, the Secretary at War transacted business which would more properly have been dealt with by a Secretary of State. Thus in 1759 the Secretary at War conducted negotiations with the Court of France for an exchange of prisoners: in 1782 he refused the aid of the military to the civil power at an execution where disturbance was apprehended.<sup>4</sup> He might in fact enlarge his

<sup>1</sup> 22 Geo. III, c. 8; 23 Geo. III, c. 50.

<sup>2</sup> It had been usual only to appoint a Commander-in-Chief in War after the expiry of Monck's tenure of office, and Anne refused Marlborough's request to be made Captain-General for life.

<sup>3</sup> See Lord Palmerston's Memorandum on the Office of Secretary at War; Clode, ii. 703.

<sup>4</sup> See Lord Palmerston's Memorandum; Clode, ii. 698, 701-2.

functions as in the case just cited, or he might, and sometimes did, minimize his responsibilities and deny all knowledge of anything connected with the Army beyond the requirements of Burke's Act.<sup>1</sup>

But it was inevitable that a collision must occur between the Commander-in-Chief and the Secretary at War; between the Horse Guards and the War Office. Burke's Act of 1782 had thrown upon the Secretary at War definite duties and responsibilities to Parliament. The Commander-in-Chief considered that the entire control of military matters vested in him, as representing the King in army administration.<sup>2</sup> He was disposed to regard the Secretary at War as a subordinate, entrusted with the duty of seeing that the law was observed as between soldier and citizen, and accounts balanced as between Parliament and the Army. Lord Palmerston, who was Secretary at War in 1810, considered that his control of military finance and accounts entitled him to issue orders and regulations which the Commander-in-Chief, Sir David Dundas, regarded as acts of interference. The one asserted, the other denied, that the War Office was independent of the Horse Guards. Lord Palmerston supported his case in an exhaustive historical memorandum, and the matter was referred to the Cabinet. The financial control of the War Office was upheld, but the Secretary at War was desired by the Prince Regent not to issue any new order or regulation until it had been communicated to the Commander-in-Chief. If he objected the dispute was to be settled by an appeal to the First Lord of the Treasury, the Chancellor of the Exchequer, or the Secretary of State for War and the Colonies.

The controversy is historically interesting as showing the slow degrees by which the royal prerogative in respect of the Army accommodated itself to the theory of ministerial responsibility.

From this time onward the two departments worked side

<sup>1</sup> *Parl. Hist.* xx. 1253. 'The Secretary at War (Jenkinson) declared he was no minister, and could not be supposed to have a competent knowledge of the destination of the army, and how the war was to be carried on.' 9 Dec. 1779.

<sup>2</sup> Cf. Omond, *Parliament and the Army, 1642-1904*, pp. 66 ff. In 1852 Queen Victoria pointed out that the Secretary at War should not be of the Cabinet; *Letters*, 1st Ser. ii. 514.

by side without further collision. Until the Crimean war the Secretary at War continued to prepare and submit estimates to Parliament, checked the details of military expenditure, was responsible for the provisions of the Mutiny Bill, for the due execution of military law, and for the security of civil rights, that is to say, it was his duty to see that the conditions under which the soldier entered the Army were not unduly severe and that the soldier did not injure the citizen in person or property.

In February 1855 the Secretary of State for War was commissioned to act also as Secretary at War, and in 1863 the office was abolished and its duties transferred to the Secretary of State.<sup>1</sup>

(c) *The Commissariat*

Of this department little need be said.<sup>2</sup> Until the Crimean war the Treasury retained in its own hands the business of finding the Army in food and forage, fuel and light. At home and abroad the officers of the Commissariat acting under the Commissioners of the Treasury made the contracts for these articles, supplied them to the troops, paid for them out of the sums voted by Parliament, and rendered accounts of the money received and paid. The system seems to have worked better than might have been expected, but at the general centralizing of military departments which took place during the Crimean war the Commissariat was handed over to the War Office in December 1854.

(d) *The Secretary of State*

*The Secretary of State for War* is the great officer of state who has absorbed the duties of so many departments. The office came into existence in 1794; in 1801 the business of the Colonies was added to it, and until June 1854 its holder was responsible for this business as well as for the number of the troops, their distribution, and matters of general policy respecting the Army.

The constitution of this office must at all times have been anomalous. Its holder had to deal with two great matters of state, Colonial administration and military policy, incon-

<sup>1</sup> 26 & 27 Vict. c. 12.

<sup>2</sup> Clode, ii. 193-203.

gruous in themselves, and made more difficult of treatment by the extreme complexity of our military organization. For the Home Secretary had also a voice in the affairs of the Army. He dealt with all matters of internal defence: commissions for all but Indian or Colonial corps were prepared at the Home Office and countersigned by the Home Secretary.<sup>1</sup> When arms were wanted for the soldiers the Commander-in-Chief stated his requirements to the Secretary at War, the Secretary at War requested the Secretary of State for the Home Department to communicate the needs of the Commander-in-Chief to the Ordnance Board, and so in due time the Army got what it wanted.

In time of peace the Secretary of State for War and the Colonies had little more to do with the Army than to submit to the King the advice of his ministers as to the number of the forces, to communicate the result to the Commander-in-Chief, to attend to the protection of our colonial possessions, and to correspond with officers on colonial service. In time of war he was responsible for the measures adopted, other than those of internal defence, and was in communication with the officers in command on foreign service.

But the Secretary at War, who should naturally have been his subordinate, was wholly independent of the Secretary of State. The appointment of a Secretary of State for War was important as regards the constitution, because now for the first time the general policy of government as to the Army was placed in the hands of a definite person holding office of the highest rank and responsible to Parliament. The Secretary at War, as we have seen, did not think himself responsible for anything more than the payment and discipline of the soldiers, and their observance of the law of the land.

The vague and partial character of the control which the Secretary of State for War and the Colonies exercised over military matters, extended to his Parliamentary responsibility. The dispersion of duties over so many departments led to mismanagement in time of war, and it was hard to say which, if any, of the departments was to blame for faults which sprang not so much from their conduct as their constitution.

<sup>1</sup> Clode, ii. 70.

In 1854 a fourth Secretary of State was appointed for War, and to him were shortly assigned the duties of all the above departments. In 1855 he was made Secretary at War as well as Secretary of State, then the Commissariat was transferred to the War Office, then the Board of Ordnance disappeared, and its duties were handed to the same department. In the same year the Board of General Officers, which had been responsible for the inspection of clothing, and the Army Medical department were absorbed in the War Office, and in the following year arrangements were made that the military accounts should be audited in this same office by auditors responsible to the Commissioners of Audit.<sup>1</sup>

Thus the Secretary of State for War, assisted by a Parliamentary Under Secretary of State and a permanent staff,<sup>2</sup> became directly responsible for the entire civil administration of the Army. The Commander-in-Chief still enjoyed an independent military control, but the Secretary of State was responsible to Parliament for the exercise of this control.

## § 2. THE GOVERNMENT OF THE ARMY FROM 1855 TO 1870

But the premature centralization of 1855 was not the end of changes in the administration of military affairs. It threw upon one man the duties of three departments, while it left his relations to the Commander-in-Chief as indefinite as they had been in the days of the Secretary at War. Soon it became clear that the Secretary of State could not discharge the combined duties of the legal and financial departments, supervise the manufacture or provision of the necessaries for the Ordnance and the Commissariat Departments, and assume a general responsibility for the policy of army administration.

Then the work of decentralization began, not in the sense of restoring the independent departments, whose separate action and responsibility had paralysed military operations in the Crimean war, but rather with a view to the logical and scientific apportionment of duties to those most competent to discharge them, in such a way that, while the Secretary of

<sup>1</sup> Clode, ch. xxiv.

<sup>2</sup> The Permanent Under Secretary's origin can be traced to the Secretary for Military Correspondence appointed in the Secretary of State's office in 1857.

State remains responsible for all and everything that is done by or in respect of the land forces of the empire, he is as little as possible encumbered with the detail of the various departments of the great military machine. First in 1868 a Controller-in-Chief was appointed, who should be a permanent officer, responsible to the Secretary of State for the supply and transport of the Army. Then in 1869 Mr. Secretary Cardwell found that there was further need of Parliamentary assistance, for the Under Secretary of State represented the War Office in the other House. In that year he tried to meet the difficulty by obtaining the assistance of one of the Lords of the Treasury, called for the time the 'War Lord'. But in 1870 it became necessary to take further steps to apportion the work of the office and to define the relations of the Secretary of State and the Commander-in-Chief.

Between 1855 and 1870, though the responsibility of the Secretary of State for all matters relating to the Army was fully recognized, there was still something in the nature of dual Government. Until 1861 a supplementary patent was issued to the Secretary of State on his appointment, in which military command and discipline, appointments and promotions, were reserved to the General Commanding-in-chief, 'subject to the responsibility of the Secretary of State'.<sup>1</sup> The two offices, the Horse Guards and the War Office, were distinct, and the officials of the former were responsible to the Commander-in-Chief.

To make the Commander-in-Chief a part of the War Office organization, and at the same time to effect such a division of labour as would relieve the Secretary of State and ensure due attention to the great departments of official business, Cardwell had recourse to a statutory distribution of duties into three departments.

These departments were: (1) *Military*, under the Commander-in-Chief, who would hold his office irrespective of party changes. To him were entrusted all matters of military command and discipline, of qualifications for appointment and promotion, the supervision of the reserve and auxiliary forces, and the department of military intelligence; (2) *Ord-*

<sup>1</sup> This patent seems to have been without legal effect; Clode, ii. 350 ff., 738 f.

nance, represented by a Surveyor-General of Ordnance, responsible for commissariat and transport, stores and munitions of war, barracks, and transport; and (3) *Finance*, represented by a Financial Secretary, responsible for the preparation of the estimates, the amount of money expended, and for proposals for any redistribution of money allotted to different votes for services. Both these officers were chosen by the Secretary of State for War, held office at his pleasure, and were eligible for seats in the House of Commons. All three departments were under the ultimate control of the Secretary of State, who was generally responsible for military affairs; their duties were prescribed by an Order in Council, and the relation of the Commander-in-Chief to the Secretary of State was by the same order defined as one of complete subordination.<sup>1</sup>

### § 3. THE WAR OFFICE SINCE 1870 AND THE AIR MINISTRY

#### (a) *The duties of the Secretary of State*

From this time forward there was no real question of separate responsibility or independence on the part of the Commander-in-Chief.<sup>2</sup> The problems to be solved are the best distribution of the business of the office with a view to its efficient conduct, and the best means of securing that the most skilled advice on all matters concerning the Army is always available for the Secretary of State; for the Secretary of State for War is responsible for things different in character, and sometimes even conflicting.

He must decide what may be called political questions concerning the Army, its place in relation to the Air Force and the Navy, the conduct of a war, the dispatch of troops at any moment to any part of the King's dominions, the relations of soldier and citizen, the maintenance of discipline, and the securities for efficiency by systems of promotion and compulsory retirement.

<sup>1</sup> 33 & 34 Vict. c. 17; and see Order in Council, 4 June 1870; *Parliamentary Papers* (C. 164) for 1870. See also Biddulph, *Lord Cardwell at the War Office*, pp. 238-40.

<sup>2</sup> The Duke of Cambridge revived the issue in 1882, to be decisively refuted by Childers; Omond, *Parliament and the Army, 1642-1904*, pp. 128-30. The Duke's views were probably unaltered in 1890; *Letters of Queen Victoria*, 3rd Ser. ii. 577, 594, 600.

He is responsible for the fortifications and commissariat being in such a state of preparation that we may be ready for defence or attack at any time.

He must follow the march of science in the invention of instruments of destruction, must ensure that our cannon, small arms, and ammunition are of the newest and best, and that we have enough. He must be able to decide business questions arising in connexion with the great factories in which the state manufactures the munitions of war. He is responsible for the finance of the Army.

His office would be most exacting even if he came to it in possession of special knowledge and was familiar with every department of military affairs, or was able to give his exclusive attention to his duties. But none of these conditions is fulfilled. The Secretary of State for War is certainly not selected for that office by the Prime Minister because of his military experience or scientific attainment. Aptitude for debate and a reputation for business capacity are the essentials: anything more than this must be a matter of chance, and the minister has, as a member of the Cabinet, to aid his colleagues in a wide range of duties.

### *(b) The division of labour*

How then is the Secretary of State to discharge his vast and multiform responsibilities? Lord Cardwell, while constituting various departments for important branches of military service, concentrated the work under three administrative officers responsible to himself. These were the Commander-in-Chief, the Surveyor-General of Ordnance, and the Financial Secretary; the duties of these officers have already been described.

The Under Secretary represented the War Office in the House of which the Secretary of State was not a member, while the Financial Secretary was, and the Surveyor-General was intended to be, a member of the House of Commons.

The office of Surveyor-General did not fulfil the intention of Lord Cardwell. In 1887 it was found that the Surveyor-General was rarely able to form a skilled opinion of his own on the business of his department, and that he was merely the



Parliamentary mouthpiece of the military men who were responsible for its various branches.

The office was therefore abolished,<sup>1</sup> and an Order in Council of 21 February 1888, when Mr. Stanhope held the seals of the War Office, redistributed the business of the department, dividing it into a *Military* side and a *Civil* side, both subject to the administrative control of the Secretary of State as responsible for the exercise of the royal prerogative in respect of the Army.

By this Order the Commander-in-Chief was made solely responsible for advising the Secretary of State on all military matters, while on the Civil side the Financial Secretary was charged with all matters relating to expenditure, account and audit, to the payment of money, and the control of manufacturing departments.

The report of Lord Hartington's Commission issued on 20 March 1890<sup>2</sup> contains the recommendations on which our present system of army administration is based.<sup>3</sup> It was there pointed out that the duties thrown upon the Commander-in-Chief were so heavy and various as to make their adequate discharge practically impossible. He was alone responsible to the Secretary of State for advice on all military matters: the officers entrusted with the administration of important branches of military service, some involving a large expenditure of money, were responsible to the Commander-in-Chief; while the Commander-in-Chief was burdened with duties heretofore discharged by the Surveyor-General of Ordnance, as well as with the preparation of estimates for the services of the year.

An officer in whom all military responsibility was concentrated, who alone communicated advice on military matters to the Secretary of State, who was charged also with important administrative duties, and who enjoyed the right of direct access to the Sovereign, occupied a position which tended to impair the constitutional responsibility of the Secretary of State.

<sup>1</sup> Order in Council, 29 Dec. 1887.

<sup>2</sup> *Report on Civil and Professional Administration of the Naval and Military Departments*, 1890 (C. 5979).

<sup>3</sup> For Queen Victoria's disapproval, see *Letters*, 3rd Ser. i. 582-4, 594.

The Commission recommended that the office of Commander-in-Chief should not be a permanent part of our military system, but that the Secretary of State should be assisted by the advice of certain principal military officers whose executive duties should not be so heavy as to conflict with their work as a consultative body, while the Commander-in-Chief should give place to a Chief of the Staff who should advise on all questions of military policy.

Sir H. Campbell-Bannerman's efforts succeeded in inducing the Queen to secure the Duke of Cambridge's retirement,<sup>1</sup> and in 1895<sup>2</sup> the recommendations of this Commission were imperfectly put into operation. The office of Commander-in-Chief was retained, but its duties lightened, and its responsibilities to some extent dispersed. The heads of four great branches of the service were made responsible for the preparation and submission of estimates for their respective departments, and for advice given to the Secretary of State on all questions connected with the duties of those departments. The disposition of duties was then as follows:<sup>3</sup>

(1) The Commander-in-Chief was entrusted with a general control over the military forces of the Crown at home and abroad, and a general supervision of the military departments of the War Office. He was charged with the general distribution of the Army, with the preparation of plans for its mobilization, and for offensive and defensive operations, with the collection of military information, with appointments, promotions, honours, and rewards. He became the *principal adviser* of the Secretary of State on all military questions.

(2) The Adjutant-General was charged with discipline,

<sup>1</sup> *Letters*, 3rd ser. ii. 504 ff., 512 f. There had been increasing evidence of the Duke of Cambridge's unfitness; Omond, *Parliament and the Army*, 1642-1904, p. 133.

<sup>2</sup> Order in Council, 21 Nov. 1895. The retention of the office of Commander-in-Chief was an error, and Lord Wolseley's tenure ended in mutual recriminations between him and the Secretary of State; House of Lords, 5 March 1901.

<sup>3</sup> This distribution of duties very nearly corresponds with the present distribution. The Chief of the Staff, renamed from 1909 Chief of the Imperial General Staff, is substituted for the Commander-in-Chief, and takes over from the Adjutant-General the subject of Military Education. The Inspector-General of Ordnance becomes the Master-General of the Ordnance and absorbs the duties of the Inspector-General of Fortifications. The creation of an effective General Staff was carried out in 1909.

military education and training, with enlistment and discharge.

(3) The Quartermaster-General was charged with the supply of food, forage, fuel and light, with transport by land and water, and with administering the non-combative services of the army.

(4) To the Inspector-General of Ordnance was assigned the provision of warlike stores and equipment, the inspection of these stores, the consideration of questions of new arms and their patterns and designs, the administration of the services connected with the Ordnance.

(5) The Inspector-General of Fortifications was concerned with fortifications, barracks, and buildings for stores, with military railways and telegraphs, and the custody of land belonging to the War Office.

The changes of 1895 proved insufficient to secure that our military policy was well planned, that the best advice was always at the service of the Secretary of State, or that the organization of the department was adapted to meet the strain of war on a large scale.

The office of Commander-in-Chief, with its great position and its various duties, was the main obstacle to any satisfactory readjustment of business. He exercised a general supervision, and therefore was under a general responsibility: the other military officers, whose duty it was to advise the Secretary of State on their respective departments, were neither independent of the Commander-in-Chief nor subordinate to him in their relations with the responsible head of the office: 'supervision' was a general and somewhat vague term, and in 1901 Lord Wolseley, whose term of office as Commander-in-Chief was then about to expire, addressed a memorandum<sup>1</sup> to the Prime Minister pointing out some of the difficulties of the position, which might be summed up in one sentence of the memorandum—'the Commander-in-Chief does not have effective control, while the heads of departments are not fully responsible'. It is true, as was pointed out by Lord Lansdowne,<sup>2</sup> that supervision might be construed so as to give to the Commander-in-Chief all the right of intervention that he could require, and that his position as the

<sup>1</sup> 1901 (Cd. 512).

<sup>2</sup> *Ibid.*, p. 5. Cf. A. Fitzroy, *Memoirs*, i. 57.

chief military adviser of the Secretary of State, coupled with this right of supervision, gave to his office all the importance in which he thought it to be lacking.

But, though Lord Wolseley's objections were met to some extent by an Order in Council which brought certain officers<sup>1</sup> under the *control* instead of the *supervision* of the Commander-in-Chief, the difficulties which the existence of the office created were insurmountable.

The great officers mentioned above, with the addition of others, met at first from time to time, afterwards weekly, under the presidency of the Secretary of State, as a War Office Council, to consider such matters as he might refer to them or as individual members might suggest: while another advisory body, the Army Board, presided over by the Commander-in-Chief, considered proposals for estimates, questions of promotion in the higher ranks of the Army, and, during the war, the details of mobilization.

Both the War Office Council and the Army Board underwent various changes between the years 1895 and 1903, in composition and in duties, but the Commission appointed to inquire into the war in South Africa was clearly of opinion that 'the want of consultative power' was still a defect in the administration of the War Office; that the various Committees and Boards created within the office for advisory purposes had been too numerous and indeterminate in their functions; and that the War Office Council stood in need of definition as to its duty and of permanence as to its character.<sup>2</sup>

At the commencement of 1904 the War Office (Reconstitution) Committee,<sup>3</sup> appointed in the previous autumn, issued a series of reports which reiterated in a curt and dogmatic form the recommendations of the Hartington Commission of 1890. The chief of these recommendations, which was at once brought into effect, was the creation of an Army Council, corresponding in character to the Board of Admiralty. The office of Commander-in-Chief was abolished and that of Chief

<sup>1</sup> These were the Adjutant-General, the Director-General of Mobilization and Military Intelligence, and the Military Secretary; Order in Council, 4 Nov. 1901. For a full account of these changes, see Appendix to *Report of Royal Commission on War in South Africa*, pp. 269-96.

<sup>2</sup> *Report of Royal Commission on War in South Africa* (Cd. 1789), pp. 132-43.

<sup>3</sup> 1904 (Cd. 1932), (Cd. 1968), (Cd. 2002).

of the Staff created, an officer to whom were entrusted the subjects of military intelligence and mobilization, military education and training.

Thus was a great change effected in the administration of the Army. By Letters Patent of 6 February 1904,<sup>1</sup> all power and authority exercised under Royal Prerogative by the Secretary of State or the Commander-in-Chief was henceforth to be exercised by a Council, consisting of three civil members—the Secretary of State, the Parliamentary Under Secretary, and the Financial Secretary—and four military members. The Secretary of State is responsible for everything, and empowered to assign their various duties to the members of the Council. To the Council has been added the Permanent Under Secretary of State who acts as its Secretary and is its mouthpiece.<sup>2</sup> The duties of the Council have been reorganized in detail by subsequent Orders in Council<sup>3</sup> but without important change. The Parliamentary Under Secretary deals with Territorial Army Associations and War Department lands. The military members are concerned with the military policy generally: personnel and discipline, supply, and armament and fortifications. The office of Inspector-General created in 1904 was terminated in 1915. It had served in Lord Kitchener's hands to interest Australia and New Zealand in compulsory training.

The report urged strongly that the members of the Council should not be immersed in the details of administration, and recommended an organization which would give to each member of the Council supervision of a branch of the service, with the corresponding expenditure, but would leave them leisure for the consideration of the general questions of policy which would come before the Council as a whole.

It must be observed that, although the Secretary of State is now a member of a Council just as the First Lord of the Admiralty is a member of a Board, he is, like the First Lord, practically supreme, as must needs be the case where he is

<sup>1</sup> *London Gazette*, 12 Feb. 1904. For King Edward's share in this and other army reforms, see Lee, ii. 194–215. The waning power of the Crown is interesting.

<sup>2</sup> *King's Regulations for the Army* (ed. 1923), Regn. 9; Order in Council, 12 Mar. 1924. See, e.g., War Office notification, 20 Feb. 1934.

<sup>3</sup> 10 Aug. 1904; 2 Aug. 1910; 15 Oct. 1922; 17 Dec. 1931.

responsible to Parliament for all matters concerning the Army. The changes of 1904 are beneficial mainly because they bring together the important advisory officers, military and financial, in one Council, and thus ensure that there should be a common policy for the whole of our military system, and that this policy should be worked out by discussion among a body of men who are under a common responsibility for advice given to the Secretary of State, himself a party to these discussions.

*(c) The Air Council*

The model of the Army Council was naturally followed on the creation of a separate air force,<sup>1</sup> and the Air Council consists since Jan. 1935 of seven members.<sup>2</sup> The Secretary of State is President; there are Air Members, (1) the Chief of the Air Staff, (2) the Member for Personnel, (3) the Member for Supply and Research, (4) the Member for Organization, Equipment, Works, and Buildings. The Parliamentary Under Secretary is Vice-President and is specially concerned with civil aviation. The Permanent Secretary acts as Secretary and has special charge of finance. The Secretary of State has final authority and responsibility.

*(d) The Secretary of State and Parliament*

The mode in which the system works may now be considered, and the relations of the Secretary of State to Parliament and to the Army or Air Force.

His relations to Parliament are these. First, he must every year ask Parliament to legalize the standing force and the rules necessary for its discipline, and to vote the money required for its efficiency in all branches of the service. And next he must answer to Parliament when called upon to do so for the exercise by the Crown of its prerogative in respect of the Army or Air Force.

(1) He considers the demands framed by the heads of the departments represented on the Council, and must endeavour to reconcile the requirements of the force for money with the

<sup>1</sup> 7 & 8 Geo. V, c. 51. It was preceded by two Air Boards, but their functions were limited to supply.

<sup>2</sup> S.R. & O., 1923, No. 1566. The King appoints the First Air Member; the Secretary of State the others.

requirements of the Treasury for economy. The presence of the technical members at discussions on these questions of supply for which the whole of the Council are responsible, tends to prevent that sharp antagonism which formerly existed between the representatives of the service and the ministers responsible to Parliament for the cost of the Army. But in the end the estimates for the various branches of the service must depend upon the decision of the Cabinet, which, in forming its decision, is sure to keep in view the probable wishes of its majority in the House of Commons and in the country. In the end perhaps the majority of the House thinks that the estimates are extravagant, while the service thinks they are insufficient. But there can be no doubt that the House is more ready to grant the sums demanded when the demand is made by a civilian, after passing the criticism of the Treasury and the Cabinet, than it would be if the demand were made by an expert, who might be supposed to think no money ill spent which was spent on his department. Unluckily the competitive claims of the defence departments renders fair treatment especially complex.

It may seem a weak point in the system that no publicity is given to the original demands made by the technical heads of departments, nor to the ground of their reduction in the Council or by the Cabinet.<sup>1</sup> The estimates usually represent a compromise: not what the authorities think it right to spend, but only how they propose to spend the sum which the Cabinet venture to demand. Perhaps if the original demand and the ground of reduction were made known, both demand and reduction would be made under a greater sense of responsibility.<sup>2</sup> Yet it would be contrary to constitutional practice for the House of Commons to increase the vote beyond the sum asked for by the Ministers of the Crown.

(2) The Secretary of State is responsible to Parliament for the exercise of the royal prerogative, and everything that is done in the Army or Air Force is done subject to his approval. He must answer to Parliament for the discipline of the forces<sup>3</sup>

<sup>1</sup> This was suggested in the report of the Ordnance Inquiry Commission, p. xiv. For discussion by the Imperial Defence Committee, see p. 247 *post*.

<sup>2</sup> 1887 (C. 5062).

<sup>3</sup> Cf. Col. Seely's resignation in 1914 when he gave inadvertently assur-

and for their relations with the citizen as well as for their distribution, efficiency, and cost. In time of war, though the Cabinet as a whole determines policy, a special responsibility naturally falls on his shoulders, as in 1914-18. The House of Commons may express its disapproval of a minister directly by censure, or indirectly by refusing him a vote on a question which he thinks important in the business of his office: but while he holds office he is responsible for the exercise of the King's prerogative in respect of the Army or Air Force, and is bound to take care that the prerogative is exercised by the Crown and not by Parliament. No one would desire to see the Army or Air Force the servant of a majority of the House of Commons, nor is it possible to conceive that the management of any minister, however incapable, would be so bad as the management of an indeterminate number of irresponsible politicians.

Especially is the Secretary of State bound to maintain the discretionary prerogative of the Crown in the appointment and dismissal of officers, their promotion or reward, or the acceptance of their resignation. In the eighteenth century the Crown used its powers for political ends and it was in part to obviate such influences that in 1793 the Commander-in-Chief was created.<sup>1</sup> At the present time qualifications for appointment are ascertainable in the first instance by the conditions of education, and beyond this, the readiness with which public opinion can be concentrated on any supposed misuse of patronage affords a fairly sufficient safeguard.

#### (e) *The Secretary of State and the Forces*

In his relation to the Army we must note here the change which has been effected by the creation of the Army Council. Until that change was effected there was a marked difference in the positions of the First Lord of the Admiralty and the Secretary of State for War. The First Lord was the first and chief of a Board, which collectively represents the Lord High Admiral and is at the head of the naval profession: while the

ances to officers at the Curragh as to their employment to maintain order in Ireland; Oxford, *Fifty Years of Parliament*, ii. 151; Halévy, *History*, 1905-1915, pp. 546-9.

<sup>1</sup> See debates in *Parl. Hist.* xxvii. 1310-18; xxx. 170-4.



Secretary of State for War had no such position in respect of the Army. The Commander-in-Chief was at the head of the military profession. He had access to the Sovereign, and the Queen's cousin was General Commanding-in-Chief from 1856 to 1887, and Commander-in-Chief from 1887 to 1895; he was for a long time independent of the civil departments, although since 1870 he was required to act in subordination to the political ruler of the Army. The Admiralty Board was thus more closely connected with the service which it controls than was the War Office.

Nor was there the same security that the Secretary of State for War should be furnished with the best professional opinion on military matters. Until the Order in Council in 1895 there was no military man responsible for advising the civilian minister except the Commander-in-Chief. The Secretary of State is now the presiding and responsible member of a Council on which civil and military members alike are bound to advise him to the best of their power, and share with him, though in a minor degree, the responsibility for the efficiency of our Army. No professional head of the Army any longer rivals the position of the Secretary of State. And the Secretary of State for Air has without a struggle stepped into the same relationship to the Air Force, which was so tardily won as regards the Army.

#### § 4. THE ADMIRALTY

We were able to deal more fully with the Admiralty than with the War Office in speaking of the departments of government, because the Admiralty stands by itself, whereas the Secretary of State for War is only one of the group of His Majesty's Principal Secretaries of State. And besides this, the War Office of to-day represents several distinct departments, and its history has been complicated by constitutional questions from which the history of the Admiralty is free. So we need only touch here upon the practical working of the department as contrasted with that of the War Office.

The Admiralty, like the Army Council, is constituted by letters patent as a Board consisting of Commissioners, of whom all or any two are equally capable of discharging the functions of the High Admiral of the United Kingdom and

the territories thereto belonging, and of the Colonies and other dominions of the Crown. On these Commissioners is cast the duty of building, arming, and victualling the fleet, of giving all orders, conferring all offices and appointments, of superintending arsenals, dockyards, and naval hospitals, and making all necessary contracts in respect of the Navy. But the constitution of the Board<sup>1</sup> by its Patent does not correspond with its actual working. And the practice of the Board as regards the relative position of its members was confirmed by Order in Council of 1872, which made the First Lord responsible to the Crown and to Parliament for all business of the Admiralty, and by Order in Council of 10 August 1904<sup>2</sup> which makes the members of the Board responsible to the First Lord for the business assigned to them by him.

The Department therefore possesses rather the character of a Council with a supreme and responsible head than that of an administrative Board.

The ultimate responsibility for the efficiency of the Navy rests with the Parliamentary chief, and ultimately with Parliament. But as lately as 1890 it seems to have been held that the First Lord should ask the Naval Lords for advice, and must not expect to receive it unasked, and that each Lord is responsible only for the business of his department.<sup>3</sup> This false impression seems to have indirectly led to grave failure by Lord Fisher to intimate adequately his views on the Dardanelles expedition.<sup>4</sup> The Order in Council above quoted must be taken to enforce individual and joint responsibility upon the entire Board.

The Board meets regularly, for two purposes: to give formal assent to matters which should come before the whole Board; and to consult upon and determine questions of general policy, such as the shipbuilding programme of the year.

The object of the Army Reformers of 1904 was to assimilate the positions of the First Lord of the Admiralty and the Secretary of State for War. Each has now a Board of competent advisers responsible for advising him to the best of

<sup>1</sup> 1905 (Cd. 2416), and see vol. ii, pt. i, p. 202.

<sup>2</sup> 1905 (Cd. 2417).

<sup>3</sup> *Report on Civil and Professional Administration of Naval and Military Departments*, 1890, p. ix, and App. i, pp. 8, 9 (C. 5979).

<sup>4</sup> *Parl. Pap.*, Cd. 8490, 8502; Cmd. 371.

their power in respect to the business assigned to them. Each has issues of the utmost complexity to deal with; the contest between advocates of battleships and submarines is complicated by the assertion of air experts that the wars of the future will be decided by air bombardments; the mechanization of the Army and the limits of the substitution of air forces are problems deeply affecting the Army Council. All the departments are equally concerned with disarmament issues, chemical warfare, abolition of submarines, aircraft restriction, limitation of objects of attack.

To discharge the responsibilities of office the civilian chief<sup>1</sup> needs not merely the faculty for administration, but the instinct to choose and the vigour to act upon the best opinion offered to him: and expert opinions often conflict. These Boards and Councils can but express opinions: and although the terms of the Patents constituting the Admiralty Board and the Army and Air Councils may seem to place the members of those bodies on an equal footing, power must needs reside in the man who is to his colleagues the spokesman of the Cabinet, and for whose action the Cabinet are responsible to Parliament.

While the Ordnance Board existed it supplied both departments alike with war material. When it ceased to exist as a separate department, the War Office, in which it was merged, continued to design and make guns for the Navy, and the stores of the two departments were kept together. The joint custody of stores was abandoned in 1891, but care is taken that by a consultative board due regard shall be had to uniformity of design of the ordnance of Army, Air Force, and Navy.

### § 5. THE IMPERIAL DEFENCE COMMITTEE

A more important point of contact between the three services is to be found in the Committee of Imperial Defence. This Committee took its origin from a recommendation of the Hartington Commission.<sup>2</sup> Suggestions had been made to the Commissioners for a combination in one form or another of

<sup>1</sup> Even when a naval officer is First Lord, as in 1931-5, he can have only partial knowledge of so vast a topic.

<sup>2</sup> *Report on Civil and Professional Administration of Naval and Military Departments*, 1890 (C. 5979), p. viii.

the Navy and Army departments with a view to improved preparation for political contingencies and for joint action in time of war. One of these proposals which has repeatedly been renewed in Parliament since the war of 1914-18, contemplated the creation of a Minister of Defence, who should be the supreme and responsible head of both services; another would have left the control of each department to professional men, with a civilian minister whose business should be mainly concerned with the expenditure and the accounts of the two services, but who might also be a medium of communication between the two. Both these proposals were open to the objection that neither service would be directly represented in the Cabinet by a minister responsible for its requirements and its interests, and that the effort to co-ordinate the services would transcend the capacity of any minister:<sup>1</sup> while the second would have placed responsibility for military and naval efficiency in the hands of men who would not be present in the Cabinet, or in Parliament, leaving financial responsibility alone to the minister. This would have made a formidable inroad on the theory and the practice that there should be some one directly responsible to Parliament for the administration of every important branch of the public service. In the end the Commission recommended 'the formation of a Naval and Military Council, which should probably be presided over by the Prime Minister, and consist of the Parliamentary heads of the two services, and their principal professional advisers'. The main purpose of this Committee would be to consider the Estimates, so that the two services might compare notes, and determine the relative importance of their respective demands, and also to deal with 'any unsettled questions between the two departments, and any matters of joint naval and military policy which in the opinion of the heads of the two services required discussion and decision'.

A Committee of this character was formed, by Lord Salisbury's government, in agreement on this head with its predecessor which had determined on it before its fall in 1895;

<sup>1</sup>A variant proposal suggests Parliamentary Under Secretaries, not in the Cabinet, for each service, who would be responsible for departmental business.

it seems to have been largely engaged in settling disputes between the War Office, Admiralty, and Treasury.

But the importance of such a Committee and its possible usefulness became more obvious as time went on, and more especially during the South African War. We find that a change comes over it in 1902, as described in evidence given before the Commission which inquired into the conduct of the war.<sup>1</sup>

From the time that Mr. Balfour succeeded Lord Salisbury, the Prime Minister has regularly presided at the meetings of the Committee, and determined who should be summoned to its meetings from time to time. In 1904 the Colonial—now Overseas—Defence Committee, which had existed since 1885 for consideration of Colonial problems was subordinated to it. The Secretary of State for War, the First Lord of the Admiralty, the head of the Army General Staff, the First Sea Lord, and the heads of the Army and Navy Intelligence departments were always present. Representatives of other departments, the Chancellor of the Exchequer, the Foreign, Colonial, or Indian Secretaries, or representatives of the self-governing colonies were summoned if their advice was needed.

The Estimates no longer formed the principal or primary subject of discussion. The needs of Imperial defence came first, and the decision of the Committee on these points guided the departments in the character and the cost of their preparations. The constitution of the Committee enabled it to offer advice to the self-governing Colonies when desired.

A further change was the result of the recommendations of the War Office Reconstitution Committee. A permanent Secretary—now assisted by four officers from the Navy, Army, Air Force, and Indian Army, was appointed to keep the records of the Defence Committee, and this last change gives a stability to the Committee and its work which was lacking, while it retained anything of the character of an ordinary Cabinet Committee.

It remains then to note some features of this Committee. It is primarily concerned with questions of Imperial Defence, and secondarily with the estimates for the expenditure of the Army, Air Force, and Navy.

<sup>1</sup> Cd. 1791, p. 550; Evidence of Mr. Brodrick.

The Prime Minister usually summons the Lord President, the Chancellor of the Exchequer, the Secretaries of State for Dominion Affairs, the Colonies, India, War, Air, and Foreign Affairs, the First Lord of the Admiralty, the First Sea Lord and Chief of the Naval Staff, the Chiefs of the Imperial General Staff and Air Staff, and the Permanent Secretary to the Treasury, but representatives of other departments which may be interested, or experts whose advice may be required, can always be summoned to attend, and the Dominions can be represented. Much of its work is done by Committees whose members are appointed *ad hoc*.

Its discussions are confidential and secret, and its functions are purely advisory. It possesses a small permanent Secretarial Staff for the record of its proceedings, and that record is preserved and handed on from one administration to another for the information of those concerned.

The Committee is held to obviate the necessity for a single Ministry of Defence. But its work is supplemented by placing on the three Chiefs of Staff as a sub-committee the duty of effective consultation on all issues of general defence, thus ensuring that the Committee shall have the advantage of the fullest technical discussion of all questions before they are submitted to it. The question of the allocation of funds to the different services is dealt with in this way so that the conflicting claims are as far as possible adjusted.

## CHAPTER XI

### THE CROWN AND THE CHURCHES

#### I. INTRODUCTORY

##### § 1. THE STATE AND RELIGIOUS SOCIETIES

THE relations of the Established Church, and other Churches in England, to the Crown in Council and to the Crown in Parliament are very apt to be misunderstood, and it may be well to consider the relations which must subsist between any and every religious society and the Crown.

A religious society exists, one must suppose, for the purpose of maintaining and enforcing definite articles of faith and of doctrine, rules of conduct corresponding to its belief, and forms of worship designed to influence faith and conduct. But such a society is in necessary subordination, so far as English law<sup>1</sup> is concerned, to Parliament, because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its members for office or franchise. Parliament in its omnipotence may do what it will with any religious society; it may pass righteous laws forbidding the public expression of opinions which are shocking or painful to the majority of citizens, or the public use of forms or rituals which disturb or demoralize them; or it may pass unrighteous laws interfering with freedom of religious opinion, or of worship, or with the free action of voluntary societies.

And again, every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of law, though that liability may be greatly reduced by the adoption of a suitable constitution. If two persons engage a third to preach a certain doctrine to them for a sum named, and refuse to pay him on the ground that his teaching has not conformed to the opinions which they engaged

<sup>1</sup> That Parliament cannot legally affect religious tenets was still maintained by Sir Thomas More; cf. Tanner, *Tudor Const. Doc.*, pp. 433-40.

him to enforce, a court of law can duly settle the matter between the disputants by comparing the doctrine which the preacher undertook to teach with the doctrines which he taught. Nor can any State avoid deciding to what extent it should allow property to be devoted to religious ends, such as masses for the dead,<sup>1</sup> or to propaganda for the destruction of all religion.<sup>2</sup>

## § 2. ESTABLISHMENT

But the Established Church has a closer connexion with the State than this necessary subordination to Parliament and liability to have its doctrine discussed and interpreted in courts of law. The King is Head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such is built into the fabric of the State. The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established. The Convocations of the Church are summoned, prorogued, and dissolved by the Crown; they cannot enter on ecclesiastical legislation without royal permission, nor make canons without the royal licence and assent. The royal assent must be given to the Church Measures passed by the Church Assembly and approved by Parliament.

The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords.

The courts of the Church are not private tribunals for determining the internal differences of a voluntary society: the law of the Church is a part of the law of the land, and the King is over all persons in all causes, as well ecclesiastical as temporal, within his dominions supreme.

For not only is the Church unable to make new canons without the royal assent, but its liturgy and Articles of Religion have a Parliamentary sanction: though not made by Parliament, they have been accepted by Parliament, and

<sup>1</sup> See *Caus, In re; Lindeboom v. Camille*, [1934] 1 Ch. 162.

<sup>2</sup> *Bowman v. Secular Society*, [1917] A.C. 406.



therefore they need the combined action of Church and State for their alteration.

A brief historical note is necessary in order to understand how these relations have come about.

### § 3. THE NATIONAL CHURCH BEFORE THE CONSTITUTIONAL REFORMATION

The conversion of England was effected piecemeal, partly from Ireland, partly from Rome during the seventh century. The Roman influence prevailed, and the English Church became a national church in communion with the Church of Rome, recognizing under a gradual process of encroachment a metropolitan jurisdiction in the Pope of Rome, until it threw off his jurisdiction in the reign of Henry VIII, and ceased to be in communion with the Roman Church.

The character of its relations with Rome was substantially fixed by William the Conqueror, and the rules which he laid down were broken, revised, re-enacted, and broken again till they were firmly embodied in the legislation of Henry VIII.

In Saxon times the Church was the nation in its religious aspect; for the Church had been an institution common to the whole country, and had brought about religious unity some time before an unstable political unity had been achieved by the Kings of Wessex. Kings and ealdormen attended the ecclesiastical councils of the heptarchic kingdoms; the Bishops were members of the witan; ecclesiastical legislation was frequently confirmed in the witan or gemot. In the tenth and eleventh centuries these ecclesiastical councils became unfrequent,<sup>1</sup> and ecclesiastical regulations were largely made in the lay assemblies.

As the distinction between the ecclesiastical and civil power is obscure in the region of legislation, so it is in that of jurisdiction. The Bishop sat with the sheriff and ealdorman in the shire-moot to declare the law spiritual. How far the Bishops had domestic tribunals, to deal with purely spiritual offences among the clergy, seems uncertain.<sup>2</sup>

The Conqueror forbade Bishops and Archdeacons to hold spiritual pleas in the court of the hundred, and required them to have courts of their own, to decide cases not by customary

<sup>1</sup> Stubbs, *Const. Hist.* i. 230-42.

<sup>2</sup> *Ibid.* 233.

but by canon law, and to allow no laymen to adjudicate on spiritual questions. The King and sheriff would carry out the sentence.<sup>1</sup> This great change made the Church a distinct body within the State. The law for the clergy was not the law for the laity, nor was it administered in the same courts. Canon law was growing, here and elsewhere, into a mass of arranged and digested rules. It included not merely regulations for the clerical life and order, and a system of penitential discipline applicable to the laity, but the law applicable to matrimonial and testamentary causes. A rivalry at once grew up between secular and spiritual courts, the latter endeavouring to oust the jurisdiction of the former in respect of persons and encroach on their business in respect of causes.

More important still was the question of the independent legislative power of ecclesiastical assemblies to make canons enforceable in the ecclesiastical courts, and the question of the right of a suitor, if dissatisfied with the decision of these courts, to carry an appeal to Rome. William, who repelled the claim of Hildebrand for fealty, met dangers which these last questions suggested by making and enforcing certain rules.

(a) No one in his dominions might receive the pontiff of Rome as apostolic pope except at his command, or receive papal letters unless first shown to himself.

(b) Nothing was to be enacted or forbidden by the Archbishop in an assembly of Bishops except what was agreeable to him and had first been enjoined by him.<sup>2</sup>

(c) His barons and officers should not be excommunicated or constrained by other ecclesiastical penalty without his sanction.<sup>2</sup>

The first of these rules strikes at the unauthorized recognition of the Pope as a final court of appeal, the second at the independent legislative action of the Church. Further, usage, claimed as a settled rule by Henry I, made it unlawful for legatine power to be exercised or for a legate to land in England without a royal licence.<sup>3</sup>

These early constitutional relations of Church and State help to elucidate the controversies of later times.

The clergy claimed immunity from secular jurisdiction; it

<sup>1</sup> Stubbs, *Charters*, p. 99 f.

<sup>2</sup> Stubbs, *Const. Hist.* i. 286.

<sup>2</sup> *Ibid.*, p. 96.

was one object of the Constitutions of Clarendon, an object not wholly attained, to make them equal with laymen before the law.

The Church courts enforced spiritual penalties with the aid of the secular power, and the abuses of this jurisdiction, under which penance was commutable for a money payment, were matter of grave complaint in the later days of the un-reformed Church.

Appeals were carried to Rome despite the rules of William I, the Constitutions of Clarendon, and later legislation,<sup>1</sup> but the corruption of the Roman Court seems to have enabled the appellate jurisdiction of the Archbishop to compete successfully with that of Rome.

Thus much for jurisdiction. The ecclesiastical assemblies had undergone a change, due to the practice which began to prevail from the end of the twelfth century of taxing separately the estate of the clergy. To settle the sums which should be granted, representative assemblies of the clergy of each province were summoned, but by no mandate from the Crown.<sup>2</sup> Representation for taxing purposes led to representation for purposes of general discussion: the refusal of the clergy to attend Parliament when summoned, and their insistence on their right to determine their contributions in their own assembly, brought about two results. The lower clergy acquired a permanent place in their convocations: and the King found it to be for his interest that the provincial assemblies should meet with frequency.

Thus the estate of the clergy kept apart: divided in the convocation of each province into two houses, an upper and a lower; meeting without the royal summons; enacting canons without the royal assent; claiming to be exempt in some respects from the secular tribunals; looking to Rome for an ultimate court of appeal.

## II. THE REFORMATION SETTLEMENT

### § 1. THE ASPECTS OF THE REFORMATION

The Reformation is a general term for four distinct forms of change which affected the Church of England in the sixteenth century—doctrinal, social, political, constitutional.

<sup>1</sup> Ibid. ii. 175.

<sup>2</sup> e.g. 27 Ed. III. st. 1; 16 Ric. II, c. 5.

With the doctrinal change we are but indirectly concerned. The Church of England became avowedly a Protestant Church, ceased to be in communion with the Church of Rome, recast its Liturgy, and determined various points of controversy in the Articles of Religion. With the substance of the change we have nothing to do; with the effect given to the change by enactments in Parliament we must presently deal.

The fundamental social changes brought about by the dissolution of the monasteries and the permission reluctantly accorded to the clergy to marry<sup>1</sup> may be passed over. Politically the House of Lords suffered a lasting change of character.

The constitutional change is of importance here.

Henry VIII was declared to be the 'only Supreme Head on earth of the Church of England'.<sup>2</sup> The Act which conferred this title was repealed by Mary, and was not revived by Elizabeth; the style, however, rests on other authority.<sup>3</sup> But her Act of Supremacy<sup>4</sup> asserted, and required all holders of office, lay and clerical, to acknowledge by oath, that the Queen was sovereign over all persons and causes ecclesiastical and temporal, to the exclusion of any and every foreign power. The terms 'Supreme Head' and 'Supremacy' do not here profess to attribute spiritual powers to the Crown; they assert, as against the alleged Supremacy of the Pope, that the King was, for all constitutional purposes, the head of a National Church.

We can recognize the sense in which the Church was thus built into the fabric of the State by an examination of the other Statutes which worked out the constitutional change, and of their effects.

The sense in which the royal Headship was recognized may be collected not only from the Act of Supremacy but from those other Acts by which the constitutional change was worked out. They fall under three heads:

- (1) the recognition of the ultimate judicial power of the Crown;
- (2) the recognition of the legislative subordination of the estate of the clergy;

<sup>1</sup> 2 & 3 Ed. VI, c. 21.

<sup>2</sup> 26 Hen. VIII, c. 1.

<sup>3</sup> 31 Hen. VIII, c. 10, s. 2. Cf. *Caudrey's Case* (1591), 5 Co. Rep. 1a.

<sup>4</sup> 1 Eliz. c. 1.

- (3) the sanction given by Parliament to the Liturgy and Articles of Religion as formulated by the Convocations.

## § 2. THE JUDICIAL POWER OF THE CROWN

The Act for restraint of appeals to Rome was passed in 1533.<sup>1</sup> It recites the capacity of the body spiritual to determine doubtful matters for itself: it further recites the statutes of former reigns against the intrusions of the see of Rome, and the inconvenience of appeals to Rome on the grounds of trouble, expense, and the difficulty of obtaining evidence. It then proceeds to enact that causes relating to testaments, matrimony and divorces, tithes, oblations and obventions, should be finally determined within the King's jurisdiction; that no citations, inhibitions, or interdicts should interfere with the rights of spiritual persons within the realm to administer the sacraments and services of the Church; and that the taking of appeals to Rome, or the introduction of any form of process from Rome, should be visited with the penalties of a *Praemunire*.

Then the Act provides for appeals. Cases which begin in the court of the Archdeacon or his official may be taken thence on appeal to the Bishop or his commissary, and thence to the court of the Archbishop of the province. Cases which begin in the court of the Archdeacon in an archiepiscopal see are to go thence to the Archbishop's Court of Arches or Audience, and thence to the Archbishop. The decision of the Archbishop was to be final in all cases save where the King was concerned; in these an appeal was given to the Upper House of Convocation.

This Act was amended by the Act for the Submission of the Clergy,<sup>2</sup> which provided a remedy for lack of justice in any of the courts of the Archbishops, enacting that an appeal should lie to the King in Chancery, and that he should on every such appeal appoint a commission under the Great Seal to such persons as he should name to 'hear and definitely determine such appeal and the causes concerning the same'.

<sup>1</sup> 24 Hen. VIII, c. 12. It enunciates formally the doctrine of England as an empire; from Athelstan to Canute imperial styles were used and 'emperor' is applied to Edward I, Richard II, and Henry V; Tanner, *Tudor Const. Doc.*, pp. 40-6.

<sup>2</sup> 25 Hen. VIII, c. 19.

The Court of Delegates, thus constituted, which apparently derived its name from the similar procedure in Admiralty, heard appeals and gave judgment, without assigning reasons, if a majority concurred: if not, 'a commission of adjuncts' was issued increasing the numbers of the Court.<sup>1</sup>

Parliament, in 1832,<sup>2</sup> took the dealing with ecclesiastical appeals from the Crown in Chancery and assigned it to the Crown in Council; giving power to the Crown to make orders as to the hearing of such appeals.

In 1833<sup>3</sup> was constituted the Judicial Committee of the Privy Council, a court which hears ecclesiastical and other appeals, and reports, as a Committee of the Council, to the Crown in Council for decision.

The ecclesiastical courts will be dealt with later; here it is enough to note that the law of the Church is a part of the law of the land; that the Crown nominates and to all intents and purposes appoints the Bishops and Archbishops who administer this law in person or through their representatives; and that from their decisions an appeal lies to the Crown in Council.

### § 3. THE SUBMISSION OF THE CLERGY, AND THE PROCEDURE OF CONVOCATION

The Submission of the Clergy<sup>4</sup> in 1532 was an acknowledgment by the Convocations of the clergy: (1) that they could be summoned only by the King's writ; (2) that they could enact no canons without the King's licence; and (3) that such as were enacted could have no force without the royal assent, nor bind the laity without the royal assent in Parliament.

The Submission was embodied in a Statute,<sup>5</sup> which also provided for a Commission, to be appointed by the King, to revise the canon law. Meantime such canons as were in force in the Church, and were not at variance with the law, were provisionally affirmed.

The Act affects (1) the rights of the Convocations to meet, and (2) their legislative power when assembled; so we will

<sup>1</sup> Lord Selborne, *Judicial Procedure of the Privy Council*, p. 34.

<sup>2</sup> 2 & 3 Will. IV, c. 92.

<sup>3</sup> 3 & 4 Will. IV, c. 41. See p. 323 *post*.

<sup>4</sup> Gee and Hardy, *Documents*, p. 176.

<sup>5</sup> 25 Hen. VIII, c. 19.

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first deal with the procedure by which Convocations are summoned, prorogued, and dissolved,<sup>1</sup> and then with their legislative powers.

The summons, prorogation, and dissolution of the two Houses of Convocation take place simultaneously with the summons, prorogation, and dissolution of Parliament, and the procedure is as follows.

First, an Order in Council is made for the issue of writs to the Archbishops of the two provinces, and then there follows the writ of summons addressed to each Archbishop.

In obedience to this writ the Archbishop of Canterbury issues a mandate to the Dean of the Province, the Bishop of London, reciting the writ and requiring that he:

'peremptorily cite all and singular Bishops Suffragans of our Cathedral Church of Christ Canterbury, constituted within the province of Canterbury, and wills that by them you peremptorily cite and monish the Deans of the Cathedral and Collegiate Churches and their Several Chapters, and the Archdeacons and other dignitaries of churches exempt and not exempt personally, and each Chapter of the Cathedral and Collegiate Church by one, and the clergy of every Diocese within our province by two, sufficient proctors to appear before us on the day named.'

The mandate threatens canonical punishment for contumacious non-attendance, and requires a return, from the individual Bishops, of the persons cited by them, and from the Dean of the Province, of his obedience to the mandate.

In the Province of York the Archbishop addresses himself directly to his suffragans and clergy.

The Bishops issue mandates to the Deans in their dioceses to attend in person and to procure the election of a proctor by the chapter, and to the Archdeacons to attend in person and to summon the clergy, who in the Province of Canterbury are represented by two proctors for each diocese, in the Province of York by two proctors for each archdeaconry, the parochial clergy being thus more largely represented than in the Province of Canterbury.

<sup>1</sup> See for all the forms Pearce, *Law relating to Convocations of the Clergy*. For the purpose of rendering possible legislation by the newly constituted Church Assembly, on 22 April 1921 the Convocations were dissolved separately from Parliament; see A. Fitzroy, *Memoirs*, ii. 743, 744, 750, 751.

Citations are issued by the Deans and Archdeacons in pursuance of these mandates, returns are made to the mandates and citations, and thus Convocation is finally assembled.

The Convocations are prorogued or dissolved by writs issued under the Great Seal.

### *Legislative Powers and Procedure*

In each Convocation the Bishops form the Upper House: the Deans, Archdeacons, the proctor representing each chapter, the two proctors for each diocese as in Canterbury, or for each archdeaconry as in York, form the Lower House.

The Archbishop of the province presides in the Upper House: the Lower Houses choose a Prolocutor.

The legislative powers of each Convocation are confined to the making, repealing, or altering of canons: and the effect of these canons, unless Parliament affirm them, is to bind the clergy only.<sup>1</sup> When it is desired that the expressed wishes of the Convocations should become a part of the general law of the land, binding alike on laity and clergy, two methods are possible.

(1) The two Houses of the Convocations meeting in Synod may pass resolutions which are subsequently adopted and embodied in a Statute by Parliament. This has been done in respect of the Book of Common Prayer, as regards its present form, when settled in 1662,<sup>2</sup> and as regards the shortened forms of service permissible since 1872.<sup>3</sup>

(2) The Convocations may pass canons which are subsequently affirmed by Parliament. The only illustration of this statement is the provisional affirmation of existing canons in the Act for the Submission of the Clergy. Such affirmation may necessitate from time to time an inquiry by a court of law into the canons or constitutions accepted and in force before the Reformation. Thus in the case of *Escott v. Mastin*,<sup>4</sup>

<sup>1</sup> See *per* Lord Hardwicke, *Middleton and Wife v. Crofts*, 2 Strange 1056.

<sup>2</sup> 14 Car. II, c. 4. The Act of Uniformity of 1559 revived the Prayer Book which had first been settled by the Convocations and then affirmed by Parliament in 1552. Although this Act of 1559 was not immediately preceded by a vote of the Convocations, it was in substance a revival of the Parliamentary sanction of 1552 which had been revoked, without any reference to the Convocations, by an Act of the first year of Mary's reign.

<sup>3</sup> *Chronicle of Convocation for 1872*, p. 299; and 35 & 36 Vict. c. 35.

<sup>4</sup> 4 Moore, P.C. 104.



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the validity of baptism by a layman was called in question, and its efficacy was maintained on the authority of the general practice of the Western Church since the fourth century, and, in particular, of the constitutions of Archbishop Peckham in 1281.

But the Convocations may pass canons, which, whether or no they are enforced by Parliament upon the laity, are binding upon the clergy, and the process by which this power is conferred should be followed.

The first stage is the communication by the Crown to the Convocations of *Letters of Business*. These may be granted on the petition of the Convocations or spontaneously by the Crown. They amount to an expression of willingness on the part of the Crown that the Convocations should discuss the matter described in the letters, either generally, with a view to concurrence in Parliamentary legislation, or specially with a view to the alteration of a canon.

These letters of business, when issued with a view to canonical legislation, are accompanied by a Licence in the form of Letters Patent, giving power to make or alter the canon in question. The licence sets forth (1) the Act for the Submission of the Clergy; (2) the permission which is accorded for the proposed change; (3) a provision that the new canon shall not be contrary to the doctrine, orders or ceremonies of the Church; (4) a provision that the new or altered canon shall not be valid until allowed and confirmed by further Letters Patent.

An illustration of the process is afforded by the proceedings in the Convocations in 1887.

The 62nd canon of 1603-4 forbade the celebration of marriage save between the hours of 8 a.m. and midday: this rule possessed a merely ecclesiastical sanction, and was not supported by any secular penalty, until an Act of 1823<sup>1</sup> imposed heavy penalties on the celebration of marriage at any other time than that specified in the 62nd canon. In 1886 the legislature extended this time, legalizing the celebration of marriage between the hours of 8 a.m. and 3 p.m.<sup>2</sup>

In 1887 the Convocations of the two provinces desired to alter the 62nd canon so as to correspond with the Act of 1886.

<sup>1</sup> 4 Geo. IV, c. 76, s. 20.

<sup>2</sup> 49 & 50 Vict. c. 14.

On 10 February the President of the Province of Canterbury stated that he had received from the Crown Letters of Business, with a Licence authorizing the Convocation to amend the 62nd and 102nd canons,<sup>1</sup> and to submit the alterations to be confirmed, if approved, by Her Majesty. The proposed amendments were then discussed in both Houses in the Convocations of both provinces, and when finally settled were transmitted through the Home Secretary to the Queen.

The royal assent was then signified by a permission to promulgate the new canons given by Licence under the Great Seal in the following form :

‘Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, Greeting. Whereas, in pursuance of the writing under our Royal sign manual, dated the 9th day of September the fiftieth year of our reign, and directed to the Lord Archbishop of Canterbury, President of the Convocation of the Province of Canterbury, the said Archbishop and the rest of the Bishops of the said Province, or a majority of them whereof the said President was one, and the rest of the clergy of the said Convocation have set down in writing and exhibited unto Us, new and amended Canons, being word for word as follows ;

(Then follows the canon in Latin and English.)

‘Now know ye that we, by virtue of our Prerogative Royal and Supreme authority in cases ecclesiastical, do hereby of our especial Grace, give our royal assent to such new and amended canons so exhibited as aforesaid, and we do allow the same and do hereby grant unto the Most Reverend Father in God our right trusty and well-beloved councillor Edward White, Archbishop of Canterbury, President of the Convocation of the Province of Canterbury, and to the rest of the Bishops and clergy therefore our royal licence to make, promulge and execute the said new and amended canons so exhibited as aforesaid, any other cause, matter or thing notwithstanding.’

‘In witness whereof we have caused these our letters to be made

<sup>1</sup> The 102nd canon contained a requirement, long obsolete, that marriages should be solemnized during morning service. In 1934 the hours of celebration were further extended by 24 Geo. V, c. 13, and it was intimated that the Convocations would later consider the enactment of this change in a canon.

Patent. Witness our self at Westminster the 16th day of September in the 51st year of our reign.

‘By warrant under the Queen’s sign manual.

(Clerk of the Crown.)’

The promulgation of a canon takes place in the presence of both Houses, the President of the Upper and the Prolocutor of the Lower House each holding a portion of the document while it is read by the President. It is then signed by members of both Houses.

Members of the Convocations have from time to time contended that the issue of two royal licences, the one to ‘make’ and the other to ‘promulge’, is an infringement of the legislative rights of the Church as defined by the Act for the Submission of the Clergy. They have maintained that the prerogative rights of the Crown are exhausted in the issue of one licence, and that on the receipt of this each Convocation is empowered to legislate as it pleases on the prescribed subject, and to promulgate such legislation with no further royal intervention.<sup>1</sup>

But this technical construction of the Act has not found favour with the legal advisers of the Crown. The first licence is always provisional—a licence to make a canon subject to the approval of the Crown—the second licence is an expression of such final approval.

It may happen that the Ministers of the Crown may think that ecclesiastical legislation on the subject suggested by the Convocations is undesirable. In that case no licence is granted. Or it may happen that when such legislation is permitted its form is regarded as open to objection, or the Convocations of the two provinces may be unable to agree as to the canons which they would put forth. The licence to ‘promulge’ may then be withheld. Such was the case in 1861 and 1865 with regard to an alteration of the 29th canon.<sup>2</sup> The existing practice seems to afford a useful check on hasty or ill-considered ecclesiastical law-making. The laity might be seriously affected by such legislation, and they have no voice in the matter except through the control exercised by the King’s ministers in the manner described.

<sup>1</sup> *Chronicle of Convocation*, 1873, Report of a Committee on Privileges, 13 Feb.

<sup>2</sup> *Chronicle of Convocation*, 1872, p. 710.

There is a very marked contrast in the case of the passing of Church measures under the procedure prescribed in the Church of England (Assembly) Powers Act, 1919.<sup>1</sup> Under the authority of that Act great changes have been effected in many aspects of Church law, including measures alleged to be confiscatory of existing rights.<sup>2</sup> On two occasions the House of Commons has refused approval of alterations of the Prayer Book on the ground that they introduced doctrines inconsistent with the Protestant faith.

Canons which bind the clergy only are enforced by various ecclesiastical punishments which we need not discuss here. They may affect the laity in so far as they would justify a minister in refusing to allow a layman to participate in certain rites of the Church.<sup>3</sup>

Canons which bind the laity may be enforced by refusal of the sacraments and by excommunication. Excommunication, which once carried with it serious civil penalties and disabilities, has been deprived of these effects by 53 Geo. III, c. 127. As a mode of enforcing the orders and decrees of an ecclesiastical court it was thenceforth discontinued: but as a spiritual censure for an ecclesiastical offence it in theory may still carry with it a liability to imprisonment for a term not exceeding six months. The excommunicate may also be refused the sacrament, and if he die in contumacy the burial service may not be performed over him.

#### § 4. THE ACTS OF UNIFORMITY; THE PRAYER BOOK AND ARTICLES OF RELIGION

The doctrines and the forms of worship distinctive of the Church of England are embodied in the Articles of Religion and the Book of Common Prayer. To maintain doctrine contrary to any of the Articles renders an ecclesiastical person liable to be deprived of any place or promotion which he may enjoy, by 13 Eliz. c. 12, s. 2. To use the Book of Common Prayer, the forms therein contained and none other, is

<sup>1</sup> 9 & 10 Geo. V, c. 76. The representation of the laity as a distinct order whose assent is necessary for any measure is some excuse for this procedure.

<sup>2</sup> Benefices (Purchase of Rights of Patronage) Measure, 1933.

<sup>3</sup> To refuse to admit a qualified parishioner to 'communion' is an ecclesiastical offence.

enjoined upon all ministers by 1 Eliz. c. 2, and 14 Car. II, c. 4. Every candidate for ordination is required<sup>1</sup> to express his assent to the Articles and Book of Common Prayer, and to take the oath of Allegiance.

The doctrines and form of worship of the Church of England are therefore sanctioned by Statute. Parliament did not frame the doctrine, nor order the worship, but Parliament has approved them, and has in certain cases provided punishment for a departure from them. Thus in order to enable shortened forms of service to be lawfully used at morning and evening prayer, it was necessary to amend the Act of Uniformity of 1662. This was done, after a report had been received in favour of the proposed alterations from the Convocations of Canterbury and York, by an Act of 1872.<sup>2</sup> But great laxity as to doctrine and forms of worship are now prevalent, in part with archiepiscopal sanction.

Thus the Church of England differs from other religious societies in this respect, that the conditions of membership are endorsed by the Legislature and cannot be altered without legislative enactment. In this sense the law of the Church is the law of the land. It cannot be altered at the pleasure of the members of the Church. The Convocations could not, even with the most ample licence from the Crown, alter or repeal any one of the Articles, or vary the rubric settled in the Prayer Book. To do this recourse must be had to the Crown in Parliament, but the protection of the laity has been diminished by the creation of the Church of England Assembly and procedure by Church Measures.

### III. ECCLESIASTICAL PLACES, PERSONS, AND PROPERTY

In dealing with ecclesiastical persons, places, and property it is only necessary to note the points at which Church matters touch and are affected by the central government.

#### § 1. ECCLESIASTICAL PLACES

For purposes of deliberate assembly, legislation, and judicature, the Church of England is divided into two provinces, the northern and the southern—York and Canterbury.

<sup>1</sup> 28 & 29 Vict. c. 122, s. 1, and s. 4 amended by 31 & 32 Vict. c. 72, s. 8; the Clerical Subscription Act, and the Promissory Oaths Act.

<sup>2</sup> 35 & 36 Vict. c. 35.

Next after the province comes the diocese, the area of the Bishop's authority and jurisdiction: the centre of ecclesiastical authority is here the cathedral, where the Dean and Chapter assist the Bishop in the celebration of divine service, and advise him in the spiritual and temporal affairs of the see. The creation<sup>1</sup> of new dioceses is now carried out by Orders in Council based on Church Measures; the older bishoprics were created by prerogative Letters Patent, the later by Statutory Orders in Council. There were in 1934 in the southern province 29, in the northern 11 dioceses in addition to those of the archbishops.

The diocese again is divided into archdeaconries for purposes of administration and formerly for judicature, and these again into rural deaneries for purposes purely administrative.

The areas of archdeaconries and rural deaneries may be altered and their numbers increased or diminished by schemes made by the Ecclesiastical Commissioners and approved by the Crown in Council.<sup>2</sup>

The ecclesiastical unit is the parish, which corresponded in the southern parts of the country to the township of Saxon times. The civil functions of the rural parish, the management of non-ecclesiastical parish property and charities, the enforcement of certain permissive Acts, and other local matters, are now transferred to an elected body, the Parish Council.<sup>3</sup> The functions of the vestry and churchwardens are transferred to the Parochial Church Council, composed of the incumbent, with elected members of the laity and co-opted members, not exceeding one-fifth of the elected members.<sup>4</sup>

The *peculiar* should be mentioned here, though it is mainly concerned with jurisdiction. A *peculiar* in the region of ecclesiastical judicature corresponded with the *liberty* in secular matters. It was a fragment taken for judicial purposes out of its geographical surroundings and assigned to some extraneous ecclesiastical person. There were in 1832 Peculiars to the number of, nearly, 300, belonging some to the

<sup>1</sup> Nineteen bishoprics were erected from 1877 to 1933.

<sup>2</sup> 6 & 7 Will. IV, c. 77; 3 & 4 Vict. c. 113; 37 & 38 Vict. c. 63. See also Church Assembly Measure, 16 & 17 Geo. V, No. 2.

<sup>3</sup> See p. 35 *ante*.

<sup>4</sup> The electors are members of the Church over eighteen years of age, resident in the Parish, not members of another religious body.

Crown, 'some to archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and canons, even to rectors and vicars'; there were also some 'of so anomalous a character as hardly to admit of description'.<sup>1</sup>

For purposes of jurisdiction these peculiars are practically abolished.<sup>2</sup>

## § 2. ECCLESIASTICAL PERSONS

In respect of their spiritual capacity, ecclesiastical persons are Bishops, Priests, or Deacons.

As regards the internal government and discipline of the Church, its officers are Archbishops, Bishops, Deans, with or without chapters,<sup>3</sup> Archdeacons, Rural Deans, Rectors, Vicars, and others who enjoy preferment and are responsible for a cure of souls, differing only from rectors and vicars in the mode of their appointment.<sup>4</sup>

The spiritual functions may be dismissed: a Bishop concerns us only in so far as he is a Bishop exercising government and jurisdiction over an episcopal see; a priest only in so far as he holds preferment or differs in status from a layman.

Administrative functions concern us only in so far as they concern central government. Jurisdiction is matter for the chapter on the Courts.

The spiritual capacity of an Archbishop does not differ from that of a Bishop, but the Bishop owes obedience to the Archbishop of his province, and has been regarded by the Privy Council, and treated by the Archbishop, as subject to his jurisdiction.<sup>5</sup>

Elsewhere we have dealt with the forms of appointment, election, confirmation, and consecration. Of the two Arch-

<sup>1</sup> Ecclesiastical Courts Commission, 1830-2, cited in the *Report of the Ecclesiastical Courts Commission*, 1883, p. 198.

<sup>2</sup> See 10 & 11 Vict. c. 98, and the continuing Acts, and 3 & 4 Vict. c. 86, s. 22; the Crown may confirm schemes of the Ecclesiastical Commission abolishing such jurisdictions; 6 & 7 Will. IV, c. 77, s. 10; 13 & 14 Vict. c. 94, s. 24.

<sup>3</sup> The case of Cathedrals is now regulated by the Cathedrals Measure, 1931 (21 & 22 Geo. V, No. 7), amended by 24 & 25 Geo. V, No. 3.

<sup>4</sup> Such are the perpetual curate, the minister of a chapel of ease, the donee; see Phillimore, *Eccl. Law*, vol. i, ch. x, pp. 239-59 (2nd ed.).

<sup>5</sup> 13 P.D. 221, and see Report of the Proceedings in the Court of the Archbishop of Canterbury, in the Bishop of Lincoln's Case, by E. Roscoe, and 14 P.D. 88.

bishops, the Archbishop of Canterbury takes precedence. He is Primate and Metropolitan of all England. He has the privilege of crowning the King, or the Queen regnant. It would appear that he also crowns a Queen Consort. This right has been claimed by the Archbishop of York, but at the Coronation of King Edward VII it was held by the Court of Claims that the crowning of Queen Alexandra, if accorded to the Archbishop of York, was accorded as a matter of grace,<sup>1</sup> and in 1911 Queen Mary was crowned by the Archbishop of Canterbury. The authority of the Archbishop of Canterbury for granting faculties and dispensations extends to both provinces,<sup>2</sup> and he can grant degrees.<sup>3</sup>

The visitatorial jurisdiction, as distinct from the ordinary jurisdiction which will be dealt with below, whether of an Archbishop or a Bishop, seems to amount to a right to hold inquiry with a view to making orders and decrees, and with a further object of taking proceedings based on the result of such inquiries. It does not extend to trial and sentence for offences against ecclesiastical law.<sup>4</sup>

In virtue of his spiritual qualifications the Bishop exercises powers which create legal rights and liabilities. He ordains: he thus qualifies the person ordained to hold ecclesiastical preferment, and brings him within the scope of ecclesiastical law. He consecrates: he thus gives to a building the character of a church. He confirms: the confirmed person is thus entitled to partake in the Sacrament of the Lord's Supper. He has administrative duties consequent on the exercise of these powers. He takes a necessary part not only in ordination but in the *institution* of an ordained person to a rectory or vicarage to which he has been presented, and he has a discretionary power, upon sufficient cause, to refuse to institute.<sup>5</sup> He visits his diocese once in every three years, and can inquire into the conduct of the persons and the condition of the fabrics

<sup>1</sup> 'It was not a question of right; the matter was one for the decision of His Majesty, and was a matter of grace and not of right.' *The Times*, 15 Jan. 1902, p. 4; Report of a sitting of the Court of Claims.

<sup>2</sup> 25 Hen. VIII, c. 21, s. 3.

<sup>3</sup> This power does not extend to granting a medical degree entitling the recipient to be registered as a duly qualified practitioner.

<sup>4</sup> *Dean of York's Case* (1841), 2 Q.B. 1.

<sup>5</sup> *Heywood v. Bishop of Manchester* (1888), 12 Q.B. D. 404.



within the range of his jurisdiction. The sanction for such orders as he may make is to be found in the judicial powers of the Bishops, to be dealt with hereafter. A suffragan, or assistant, Bishop is appointed in the manner, and enjoys the powers, described below.<sup>1</sup> The mode in which a Bishop is chosen, confirmed, and consecrated,<sup>2</sup> is described elsewhere.

A *Dean*<sup>3</sup> is appointed by Letters Patent under the Great Seal: so too are the Canons who constitute the Chapter, except where the right of appointment to a canonry is vested in the Bishop. In theory the Dean and Chapter are a council of advisers to the Bishop: in fact, they are responsible for the service of the cathedral, they take a formal part in the election of a bishop, but the actual duties of members of the Chapter do not correspond with the original conception of its purpose.

An Archdeacon is appointed by the Bishop of the diocese. Although, unlike the Dean, he is not appointed by the Crown, he is more closely connected with the central government, in so far as he possesses judicial functions; he had a court and a jurisdiction subordinate to that of the Bishop; he has definite responsibilities in respect of the buildings in his archdeaconry, and a right of visitation in order to ensure that these responsibilities are carried out.

A Rural Dean is an officer appointed by the Bishop with a duty to make inspection and report generally on the condition of buildings within his deanery, and specially when placed on a commission of inquiry issued by the Bishop under the Clergy Discipline Act<sup>4</sup> or the Incumbents' Resignation Act.<sup>5</sup>

Beyond these officers of the Church is the body of beneficed clergy with a freehold tenure of their office; beyond these again is the body of the clergy unbeneficed, or holding offices not as property but by contract, such as curates or chaplains.

With these we are only concerned in so far as the *status* of a person in Orders differs from that of a layman.

<sup>1</sup> See p. 283 *post*.

<sup>2</sup> Vol. i: *Parliament*, pp. 234-8.

<sup>3</sup> The word 'dean' means in its origin that one of ten men who was responsible for the good behaviour of the rest. The secular tithing is a corresponding institution. The Dean is a person of authority, whether he is Dean of a chapter, of a peculiar, or of a college. The senior *decanus* became chief of the *decani*. Then the other *decani* disappeared and he became chief of the Society.

<sup>4</sup> 3 & 4 Vict. c. 86.

<sup>5</sup> 34 & 35 Vict. c. 44.

The person in Orders is subject to certain statutory disabilities. He cannot be chosen to serve in the House of Commons,<sup>1</sup> though he is not disqualified from being a member of a county council, nor from holding municipal office.<sup>2</sup> He cannot, while holding any ecclesiastical preferment, occupy himself in farming over 80 acres or in trading.

He enjoys certain immunities. He is exempt from serving on juries, and from arrest while performing divine service or in convocation, and on his way to or from the performance of service or convocation.

He is subject to canons imposing rules of conduct which do not bind the laity, and the sanction which enforces them may affect his title to the preferment which he holds, and even his personal liberty.

Monition, Suspension, Deprivation are the forms in which the sentence of an ecclesiastical Court may be expressed.

The offender may be *admonished* to do or abstain from doing a specific thing. He may be *suspended* from the exercise of his clerical functions. He may be *deprived* of his preferment. If he contumaciously disregard the sentence of the Court he may be subject to imprisonment. Like the soldier or sailor, he is subject to an exceptional code, enforced by an exceptional procedure, and like them he is protected by the secular Court, which restrains excess of jurisdiction by writ of *Prohibition* and improper restraint of the person by writ of *habeas corpus*.

He cannot get rid of his Orders except by a special procedure provided by the Clerical Disabilities Act,<sup>3</sup> which enables him so to divest himself of his clerical character as to become capable of entering the House of Commons.

It is worth while to summarize the mode of appointment to the offices described above.

The Crown (acting on the advice of the Prime Minister)<sup>4</sup> appoints Archbishops, Bishops, and Deans of Chapters; Canons are appointed either by the Crown or by the Bishop

<sup>1</sup> 41 Geo. III, c. 63.

<sup>2</sup> 15 & 16 Geo. V, c. 54, repealing 45 & 46 Vict. c. 50, s. 15.

<sup>3</sup> 33 & 34 Vict. c. 91; Church Measure, 24 & 25 Geo. V, No. 1.

<sup>4</sup> For Queen Victoria's overruling of Disraeli's suggestion of an Archbishop in 1868, see Oxford, *Fifty Years of Parliament*, ii. 215 f.; for her relations with Lord Rosebery, see *Letters*, 3rd Ser., ii. 470 ff., 498.

of the diocese; Archdeacons and Rural Deans by the Bishop. The right of presentation to rectories, vicarages, and other like preferment, is a right of property which may be vested in the Crown or in a subject, or a Diocesan Board of Patronage, but the Crown has, by prerogative, the right to present to a benefice, and it would seem also to an archdeaconry or canonry, when it has created the vacancy by making the previous holder an English bishop.<sup>1</sup>

### § 3. ECCLESIASTICAL PROPERTY

The Church of England is not a corporate body. It is a religious society within which many corporations exist. They exist for the purpose of promoting the objects of the society, and they have at different times received endowments mainly from private munificence. The only general liability enforced by law for the benefit of the Church is the payment of tithe. This liability is not, nor was it in its origin, an endowment of the Church by the State. It was a voluntary payment; the duty to make it was preached by the Church, and when the duty came to be generally recognized it was enforced by the State. It is now commuted for a charge upon land, formerly varying in amount with the septennial average price of corn, in respect of which provision for stabilization and ultimate redemption has been made by the Tithe Act, 1925; it is an article of property, of the nature of realty, not tenable only, or necessarily, by ecclesiastical persons.

Dismissing, therefore, the question of a state endowment of the Church it remains to ask in what way the property of the various corporations within the Church comes into contact with the State otherwise than as all property is protected by the Courts of the State.

*Queen Anne's Bounty* is a restoration by the Crown to Church purposes of money derived from Church property.

<sup>1</sup> The limits of this prerogative are discussed in the case of *The Queen against the Provost and Fellows of Eton College* (1857), 27 L.J. (Q.B.) 132; 8 E. & B. 610. 'The general dictum, that if an incumbent is made a bishop the Crown shall present to his preferment thereby vacated, cannot be relied on: for this evidently was meant to be understood of English preferment, and an English bishopric, and the same writers who lay this down say that the rule does not extend to a titular bishop or suffragan under 26 Hen. VIII, c. 14.' It was held not to extend to a colonial bishop.

'First-fruits', or the first year's profit of the bishopric, or other ecclesiastical benefice, and 'tenths', or an annual tax on the rateable value of all benefices, were exactions made by the Pope upon the estate of the clergy before the Reformation. Henry VIII appropriated these to the Crown, and they became a source of royal revenue, the amounts being calculated on a valuation made in the reign of Henry VIII.

Queen Anne restored this revenue to Church purposes, obtaining power from Parliament<sup>1</sup> to create by Letters Patent of 3 November 1704, a corporation upon which should be settled for ever the produce of these first-fruits and tenths. The Governors of Queen Anne's Bounty, constituted in pursuance of this Act, manage this fund, applying it partly in loans, repayable over a series of years, for the building of residences for the clergy, partly in grants to meet dilapidations<sup>2</sup> or to make improvements, and up to 1919, partly in augmenting poor livings, on condition that sums equal or greater in value to those which they applied to such augmentation were advanced by private gift. Under the Tithe Act, 1925, the tithe rent charge attached to benefices was vested from 31 March 1927 in the Bounty which collects tithes and pays incumbents.<sup>3</sup>

For eleven years, from 1809 to 1820, Parliament granted £100,000 a year in aid of this fund;<sup>4</sup> apart from this the fund drew from public sources only the first-fruits and tenths. By the First Fruits and Tenths Measure, No. 5 of 1926, these imposts were abrogated or commutation arranged for.

The Ecclesiastical Commission is a body incorporated by 6 & 7 Will. IV, c. 77, and somewhat altered in its composition by 13 & 14 Vict. c. 94. These Acts provide for the management and distribution of episcopal and capitular estates.

'Under their provisions the incomes of all the Archbishops and Bishops of the sees then existing were regulated and fixed at their present amounts, some of them having been excessive while others

<sup>1</sup> 2 & 3 Anne, c. 20. See also 59 & 60 Vict. c. 13, s. 1.

<sup>2</sup> See Ecclesiastical Dilapidations Measure, 1923 (14 & 15 Geo. V, No. 3), amended by 19 & 20 Geo. V, No. 3.

<sup>3</sup> In 1934 a Royal Commission on tithes was set up. The rules of administration are laid down in the Tithe (Administration of Trusts) Measure, 1928 (18 & 19 Geo. V, No. 2).

<sup>4</sup> Lord Selborne, *Defence of the Church against Disestablishment*, p. 162.

were small and inadequate. . . . What was thought superfluous in the establishment of the several capitular bodies was retrenched, the number and stipends of their canons and assistant ministers being fixed by law.<sup>1</sup>

After these arrangements had been made the proceeds of the estates assigned to the management of the Commissioners produced a surplus available for general Church purposes, and this was treated as a common fund and applied to the endowment of new livings or the increase of poor livings in populous places.

For the adjustment of the revenues of the Church to local requirements the Ecclesiastical Commissioners have very considerable powers, chiefly in the arrangement of boundaries. With these we are not concerned, except to note that the State has taken upon itself the management of large estates belonging to corporations within the Church as the most convenient mode of ensuring the distribution of the income thence arising for the benefit of the entire society.

The Ecclesiastical Commissioners Measure, 1926, gives powers as to augmentation of archdeaconries, endowment of new bishoprics, the costs of proceedings by bishops, the upkeep of Lambeth and other residences.<sup>2</sup>

In 1934-5 proposals for the alteration of the constitution of this Commission and Queen Anne's Bounty with a view to the same body performing these functions were under consideration.

#### IV. THE CHURCH OF SCOTLAND

##### § 1. INTRODUCTORY

The English Reformation was led and controlled by the King; the Scots Reformation was a popular movement. Its doctrines were set forth in audience of the whole Parliament on 17 August 1560.

'Knox and his compeers were present to support their supplication; the bishops, in their place in Parliament, were invited to impugn the articles proposed; and all the forms of a free and deliberate voting of the doctrine *as truth*—as the creed of the

<sup>1</sup> Ibid. p. 164.

<sup>2</sup> 16 & 17 Geo. V, No. 2.

Estates, not of the Church—were gone through. It was a doctrine “professed by the Protestants”, exhibited by them “to the Estates, and by the Estates voted as a doctrine grounded upon the infallible word of God”.<sup>1</sup>

A form of Church government by presbyteries and a general assembly was the outcome of this movement. In 1647 the creed of 1560 was superseded by the Confession of Faith drawn up at Westminster in that year by an assembly of Puritan divines and accepted by the Scottish General Assembly, the Presbyterian form of Church government having been already affirmed. The national character of the Church was strengthened and deepened by the persecutions of the last Stuarts, who endeavoured to enforce an episcopal constitution like that of the English Church. Soon after the Revolution two important Statutes were passed, one in 1690 for ‘ratifying the Confession of Faith and settling Presbyterian Church government’: another in 1693 ‘for settling the Peace and quiet of the Church’, imposing this confession as a standard of doctrine upon all ministers in the Church. The constitution of the Church Courts had been settled as early as 1592 and has not varied. The settlement of 1690 and 1693 was confirmed in 1705 by an Act of Security passed by the Scots Parliament and incorporated in s. 5 of the Act of Union, whereby it is enacted that the ‘Act for securing the Protestant religion and *Presbyterian Church government, with the establishment* in the said Act contained’, is to be a ‘fundamental condition of the Union’, and ‘to continue in all times coming’.

In some details this settlement has been modified, but in all important features it has been maintained.

## § 2. MODE OF GOVERNMENT

Premising that the articles of faith of the established Presbyterian Church have been defined by general assemblies of the Church and their definition perpetuated by Statute, it follows that we must note the existing form of Church government and its connexion with the State.

The administrative, judicial, and legislative powers of the Church are in the hands of four bodies, and in 1700 the Scots

<sup>1</sup> Taylor Innes, *Law of Creeds in Scotland*, p. 13; James Cooper, *Confessions of Faith . . . in the Church of Scotland* (1907). Cf. James Barr, *The United Free Church of Scotland*.

Parliament declared this system to be agreeable to the Word of God.

At the bottom of the scale is the Kirk Session, corresponding to the English vestry, wherein the minister and a small number of elders, not less than two, superintend matters of discipline and worship, and the administration of parochial charities.

Above this body is the Presbytery, a word used sometimes to mean an assembly, sometimes the district from which the assembly is gathered. It consists, as an assembly, of all the ministers within the geographical limits of the Presbytery, and the Professors of Divinity (being ministers) of any University within those limits together with representatives of the elders. The number of these bodies—at present eighty-four—is fixed by the General Assembly.

The Presbytery is a Court of Appeal from the Kirk Session, and discharges besides, in relation to the ministry, functions corresponding to those of the English episcopate. It examines candidates for the ministry, confers licence to preach, ordains, approves persons selected to be parish ministers,<sup>1</sup> inducts them and supervises their conduct in the ministry.

The Provincial Synod stands next above the Presbytery, and acts as an intermediate Court of Appeal from that body. The Synod consists of the members of all the presbyteries within its bounds; there are at present sixteen.

The General Assembly is the supreme administrative, legislative, and judicial body in the Scots Church.

It consists of a quarter of the ministers of every presbytery and a like number of elders. Thus, unlike the English Convocation, it contains a fair representation of lay members of the Church.

### § 3. RELATIONS OF CHURCH AND STATE

The relations of the Assembly to the Crown are peculiar. It meets on a day formerly named simultaneously by the Moderator, who presides over its deliberations, and the High

<sup>1</sup> Ministers are elected by the members and, as a rule, adherents of the church concerned. Their qualifications are of a very high educational character, involving a prolonged University course. See 37 & 38 Vict. c. 82, s. 1, and J. T. Cox, *Practice and Procedure in the Church of Scotland* (1934).

Commissioner, who is present to represent the Crown but takes no part in discussion. This form recorded the remnant of the old feud between Church and State, but now is disused; the Moderator alone fixes the date, the right of the Church to control its own sessions being thus conceded.

Legislation takes place, without royal initiation or assent, in the form of *overtures*. These are resolutions passed by the General Assembly and submitted to the presbyteries throughout the kingdom. When approval of the presbyteries has been signified, these resolutions may be enacted by the Assembly, and become law: but sometimes in cases of urgency Acts are passed which have the force of law, unless the presbyteries should express dissent. The powers of the General Assembly are very wide. In legislation it is not hindered by the need for letters of business or licence to make or alter canons without which the English Convocation cannot act.

In judicial matters it is a final Court of Appeal. No superior court of secular judges, corresponding to the Judicial Committee of the Privy Council, can review its decisions; nor does it seem that anything in the nature of a writ of Prohibition can restrain its judicial action.

But the General Assembly is bound by the law of the land, and in the case of an Established Church this limit on its legislative and judicial action does not mean merely that it must not invade civil rights. The law of the land, for an establishment, means not only the general law, but the Statutes by which its faith, discipline, and principles of government have been fixed.

This principle was enforced upon the Assembly in the proceedings which led to the disruption of the Scots Church and the formation of the Free Church in 1843. An Act of 1711,<sup>1</sup> a discreditable breach of the treaty of Union, restored and confirmed the rights of lay patrons to present to pastoral charges. In 1834 the Assembly claimed for the presbyteries the right to refuse to admit a person whom the Congregation was unwilling to accept. The Courts upheld the statutory rights of the patrons. The Assembly does not seem so much to have claimed the right to exercise a discretion in individual

<sup>1</sup> 10 Anne, c. 12.



cases, as an inherent right to act independently of statute law in matters appertaining to Church government.<sup>1</sup>

Whatever might have been the view of a court of law as to the rights of the Assembly to insist that lay patrons made a reasonable use of their powers, it was impossible to admit the right of the Assembly to override the law of the land. The Assembly was forced to yield, and a large secession from the Established Church was the result of a prolonged and interesting struggle.<sup>2</sup>

But the Free Church, constituted as the result of this secession, illustrated in course of time the principle that no society, religious or secular, which possesses large property held upon trusts, is exempt from legal control. The Free Church of Scotland admitted to its membership under the style of the United Free Church, by the decision of a majority of its governing body, the United Presbyterian Church of Scotland, a society whose profession of faith differed in some particulars from that formulated by the seceders of 1843.

The minority, a small body in comparison, raised the legal question whether the society thus constituted was entitled to enjoy the privileges and property which belonged to Free Church membership. The matter came for decision before the House of Lords in 1904,<sup>3</sup> and the majority of the Court, on a very narrow view of the case, held that the identity of a Church was to be found in its doctrines, creeds, and formularies; that the power to change these, and still to retain this identity, must not be assumed, but must be shown to exist, and to have been provided for in the original conditions of membership; that the existence of this power was not proved, and that the majority of the Free Church had committed a breach of trust which disentitled them to the enjoyment of the property belonging to the society.

This decision, based upon a rigid construction of trusts,<sup>4</sup>

<sup>1</sup> See *Presbytery of Auchterarder v. Lord Kinnoul*, 6 Clark & Fennelly, 646, and compare with *Heywood v. The Bishop of Manchester* (1888), 12 Q.B. D. 404. The Presbytery, it should be noted, claimed to refuse the presentee without alleging any further disqualification than that the Congregation objected to him.

<sup>2</sup> In chapter iii of Taylor Innes's *Law of Creeds in Scotland*, and in the appendices to the chapter may be found a full account of the controversy.

<sup>3</sup> *Free Church of Scotland v. Lord Overtoun*, [1904] A.C. 515.

<sup>4</sup> The dissenting judgment of Lord Macnaghten suggests that it might

had a further result beyond showing that a voluntary religious society, where disputes arise as to the right to enjoy its property, is subject to the interpretation of its doctrines by a court of law. The minority, who had succeeded in establishing to the satisfaction of the House of Lords that they were, in point of doctrine, the genuine Free Church of Scotland, were so small a body that they were unable to carry out the trusts for the observance of which the property had been given. The intervention of the legislature became necessary, and by 5 Ed. VII, c. 12, a Commission was appointed with power to allocate the property of the Free Church as between the parties to the dispute in accordance with the practical religious needs of the two bodies.

In 1921<sup>1</sup> an Act was passed to declare the legality of Articles declaratory of the constitution of the Church of Scotland which were enacted in order to permit the reunion with it of the United Free Church, and which accord power of change. The cause of reunion was furthered by legislation<sup>2</sup> permitting the transformation of teinds into rent charges on land on a definite basis, and the extinction of the obligations of heritors. The merger therefore took place in 1929, but a portion of the United Free Church remains in being, having received by agreement since 1931 a sum in lieu of a share of the endowments of the Church.

The Episcopalian Church in Scotland, at one time the object of repressive legislation, is now like all Churches, other than the Church of Scotland, regarded simply with complete toleration by the State.

#### V. THE CHURCH IN IRELAND, WALES, INDIA, THE DOMINIONS, AND COLONIES

The Irish Church is now a voluntary society, but the process of its disestablishment, disendowment, and partial have been possible to combine a regard for the rules of construction, even in the case of trusts, with some consideration for the declared views and intentions, as to its doctrinal development, of a great religious society.

<sup>1</sup> 11 & 12 Geo. V, c. 29; effective from 28 June 1926 (S.R. & O., 1926, No. 841). The power of alteration is subject to a defined procedure, but otherwise is almost unlimited, the Church thus possessing far greater freedom than the Church of England from control by the State.

<sup>2</sup> 15 & 16 Geo. V, c. 33; 23 & 24 Geo. V, c. 44; 22 & 23 Geo. V, c. xxi. The properties of the Church are controlled by General Trustees.

re-endowment affords some illustration of the character of an Established Church.

The Irish Church was, by Article V of the Act of Union, united to the English Church, as a Protestant Episcopal Church, 'in doctrine, worship, discipline, and government'. But no meeting of the Convocation of the Irish Church had taken place for 200 years.<sup>1</sup>

By the Act of 1869 (32 & 33 Vict. c. 42):

(1) The union of the two Churches, created by the Act of Union, was from a certain date dissolved, and it was enacted that from that date the Church of Ireland should cease to be established by law.

(2) Existing ecclesiastical corporations, whether aggregate or sole, were dissolved. Where a corporation is dissolved its proprietary rights also disappear.

(3) All rights of patronage, including the right of the Crown to nominate Bishops and other dignitaries of the Church, were taken away. In case of private patrons provision was made for compensation.

(4) The Archbishops and Bishops, ceasing to be nominated by the Crown, ceased to be spiritual peers, and lost such rights as they possessed to sit in the House of Lords.

(5) Ecclesiastical jurisdictions and ecclesiastical law, as a part of the law of the land, were abolished. But the ecclesiastical law was to be binding on the members of the Church as constituting the terms of a contract into which they had entered, and which would endure until altered by a body representative of clergy and laity. A convention in 1870 established a General Synod, with a House of Bishops and of Representatives and declared the doctrines of the Church.

(6) A Representative Church Body was incorporated by Letters Patent of 15 October 1870 under power given to the Crown to incorporate such a body, when constituted, so as to enable it to hold property.

(7) Until such incorporation the entire property of the Irish Church was vested in a Commission which was intended to carry into effect three purposes, ( $\alpha$ ) compensation for life interests affected by the change; ( $\beta$ ) the transfer to the newly incorporated society of the churches, glebe houses, and a

<sup>1</sup> *Parl. Deb.*, 3rd Ser. cxciv. 423.

sum of £500,000 in compensation for endowments made by private persons since 1660; (γ) the retention and management of the residue for such purposes as Parliament might thereafter determine.

The powers of this body were transferred in 1881 to the Lands Commission, and the Irish Church Temporalities Fund has been duly apportioned between the Free State and Northern Ireland.<sup>1</sup>

Thus the Irish Church is a voluntary society with full powers of self-government, including, as it would seem, the power to alter its doctrines and its constitution.

The position of the Church in Wales is similar to that of the Church in Ireland. By the Welsh Church Act, 1914, passed under the procedure of the Parliament Act, 1911, but postponed in operation by subsequent legislation until 31 March 1920,<sup>2</sup> the Church of England in Wales and Monmouthshire was disestablished. Welsh bishops ceased to be qualified to sit in the House of Lords, and Welsh clergy to be represented in Convocation. Ecclesiastical law and courts ceased to exist as law, but power was given for the creation of a representative body<sup>3</sup> which may provide for the government of the Church; the creation of courts, which, however, may not exercise coercive jurisdiction and from which appeal does not lie to the Privy Council; and the alteration of ecclesiastical law. Subject to this power the existing law was made binding on members of the Church as though they had agreed to be so bound, and was to be enforced as regards property rights in the temporal courts. In virtue of the powers given the Church has created a governing body, and has provided (20 April 1922) that its courts are not bound by decisions of the English courts or the Privy Council in relation to matters of faith, discipline, and ceremonial.

A body of Welsh Commissioners was set up under the Act of 1914<sup>4</sup> to deal with the property of the Church and to distribute it between the Church representative body and

<sup>1</sup> 10 & 11 Geo. V, c. 67, s. 31; Northern Ireland Act, 12 & 13 Geo. V, c. 13.

<sup>2</sup> 4 & 5 Geo. V, c. 88, s. 1; 9 & 10 Geo. V, c. 65, s. 2.

<sup>3</sup> See Order in Council, 15 April 1919, approving charter of incorporation by Crown.

<sup>4</sup> Powers are continued by 9 & 10 Geo. V, c. 65, s. 1 (1); S.R. & O. 1928, No. 894.

various local authorities. On that body were conferred certain powers of making rules of procedure subject to confirmation by the Crown in Council and of deciding without appeal issues of law and fact. But they cannot act as judge in matters affecting their own rights.<sup>1</sup>

The Scots Church is an establishment with ample powers of self-government, limited by the fact that its doctrine and constitution are stereotyped in the statute book—are not matter of private contract but are part of the law of the land. But both are now open to change by the action of the Church alone, without further Parliamentary approval.

The English Church is an establishment which, while it enjoys a greater dignity in its connexion with the State, enjoys also very limited powers of self-government, being controlled at every turn by the Crown, Parliament, and the Courts.

But no voluntary society, however free, can escape subjection to the general law of the land, because its members are entitled to an observance of the terms on which they were invited to join it. And if a majority determine to alter the constitution or creed of the society the law courts must determine disputed rights of property between the majority and the dissentient minority. But in practice Nonconformist Churches in England have had little difficulty in so adjusting the trust deeds affecting their property as to escape litigation.<sup>2</sup>

But a voluntary society may so fix its articles of faith and conditions of government as to deprive itself of the power of development or change. This has been done by the Free Church of Scotland in a deed of settlement which, as has been shown on a preceding page, was held to be irrevocably binding upon the members of the Church as a title to the property of the Society.

It has also been done more precisely by the Primitive Wesleyan Methodist Society of Ireland, which has put its

<sup>1</sup> *Wingrove v. Morgan*, [1934] 1 Ch. 423, varied 431.

<sup>2</sup> Thus the union on 20 Sept. 1932 of the Wesleyan Methodist Church, the Primitive Methodist Church, and the United Methodist Church into the Methodist Church was effected without litigation. But in Canada the union in 1925 of the Presbyterian, Methodist, and Congregational Churches was followed by serious litigation, e.g. *St. Luke's, Salt Springs Trustees v. Cameron*, [1930] A.C. 673.

doctrine, discipline, and rules into an Act of Parliament,<sup>1</sup> with a provision that the discipline and rules may be altered in a manner prescribed by the Act but that the doctrine is not to be altered. The Calvinistic Methodist or Presbyterian Church of Wales Act of 1933 accords that Church spiritual autonomy and regulates its property.

In *India* the Crown had power by Statute to create certain bishoprics, and to confer and define episcopal jurisdiction.<sup>2</sup> But the Indian Church is now severed in government and is autonomous.<sup>3</sup>

The tangled history of the Church in the *colonies* can be but briefly touched upon here. The extent of the royal prerogative in relation to the Church, whether in conquered or ceded colonies or settled colonies, has been the subject of much dispute and perhaps of needless confusion. We must keep apart the episcopal *status* and the episcopal jurisdiction, and then we may arrive at a clear understanding of the matter.

One may say that though the King cannot consecrate a bishop, yet that in England a bishop cannot be consecrated without his assent<sup>4</sup> expressed in one or other of several forms.

The King cannot, however, introduce into a colony the ecclesiastical law and the apparatus for enforcing it, except in those cases in which he has legislative power, either by prerogative,<sup>5</sup> or as formerly in the case of the Indian bishoprics, in exercise of statutory powers. For it is laid down by Lord Coke, and was accepted by the Privy Council<sup>6</sup> as a settled constitutional principle, that the Crown cannot establish new Courts to administer any law but the Common law. The result is that in settled colonies<sup>7</sup> the King cannot establish any ecclesiastical jurisdiction without statutory authority.

<sup>1</sup> 34 & 35 Vict. c. 40.

<sup>2</sup> 53 Geo. III, c. 155; 6 Geo. IV, c. 85; 3 & 4 Will. IV, c. 85.

<sup>3</sup> 17 & 18 Geo. V, c. 40; Indian Church Measure, 17 & 18 Geo. V, No. 2; Letters Patent, 11 June 1929, incorporating Indian Church trustees.

<sup>4</sup> See judgment of the Master of the Rolls in the *Bishop of Natal v. Gladstone* (1865), L.R. 3 Eq. 49.

<sup>5</sup> i.e. in conquered and ceded colonies, in which the prerogative has not been surrendered.

<sup>6</sup> *The Bishop of Natal, In re* (1865), 3 Moore, P.C., N.S., 115.

<sup>7</sup> The law introduced by the settlement does not include ecclesiastical law; Keith, *Const. Hist. of First British Empire*, p. 222.

The misadventures of the Church in South Africa have furnished illustrations of the rules laid down. There the Crown was advised to issue Letters Patent for the creation of a diocese (Cape Town), and the appointment of a bishop with episcopal jurisdiction, and subsequently to subdivide this diocese into three, placing the Bishop of Cape Town in the relation to the other two of Metropolitan to suffragan bishops. The arbitrary and unjudicial action of the Bishop of Cape Town brought into question the validity of the Letters Patent under which he claimed jurisdiction.

(1) In the first of a series of cases it was held that his letters patent were invalid to confer jurisdiction in a settled colony, or a ceded colony, with a representative legislature.<sup>1</sup>

(2) In the next case<sup>2</sup> which arose, Bishop Gray (of Cape Town), in the exercise of his supposed powers as Metropolitan, professed to try, condemn, deprive and excommunicate Bishop Colenso (of Natal), and it was held that the Letters Patent of the two bishops did not confer upon the one the rights, or impose upon the other the liabilities, asserted by Bishop Gray. In this case, the Privy Council again speak of the limitation of this exercise of the royal prerogative in colonies with *legislative* institutions, and the judgment was probably based on an erroneous view of the facts, for Natal, when jurisdiction was given, was subject to the Crown's right to legislate, as a conquered or ceded colony.<sup>3</sup>

(3) In the third case,<sup>4</sup> however, it was held that although Bishop Colenso had not acquired or become liable to any jurisdiction in virtue of his letters patent, yet that he was thereby constituted Bishop of Natal in point of status and was entitled to claim payment of the funds held by trustees for the endowment of the bishopric.

The history of the Church in South Africa as a result of these decisions was curious. The main body of the Church constituted itself into the Church of the Province of South Africa, which is in communion with the Church of England,

<sup>1</sup> *Long v. The Bishop of Cape Town* (1863), 1 Moore, P.C., N.S., 411.

<sup>2</sup> *The Bishop of Natal, In re* (1865), 3 Moore, P.C., N.S., 152.

<sup>3</sup> This was held in *Bishop of Natal v. Green*, [1868] Natal L.R. 138, and the judgment was not overturned on appeal to the Privy Council, and the Bishop continued to exercise his functions.

<sup>4</sup> *Bishop of Natal v. Gladstone* (1866), L.R. 3 Eq. 1.

but which declines to be bound by the decisions of the Privy Council in matters of faith and discipline,<sup>1</sup> while during his life Bishop Colenso remained apart from that Church. The property difficulties resulting from the existence of two churches were solved in Natal by legislation in 1910, and by the fact that there has been no consecration of a bishop to take the place of Bishop Colenso, the Church of England declining to recognize any Church save that of the Province of South Africa.

The effect of the decisions in these cases was to terminate the practice of creating bishops by Letters Patent. It was felt that even in the colonies in which the Crown could legislate, it was preferable to leave the matter to local legislation so far as it was desirable to provide for property questions. Already in the case of Canada legislation had been held necessary to clear up the position of the Church, and in Australia there had been objections raised to the exercise of visitatorial jurisdiction by bishops under Letters Patent. The Church has therefore in the Dominions and colonies been organized either by agreements which are binding by way of contract, as in the case of other fraternities or religious bodies, or by Acts of the local legislatures. The power still remains to the Crown to create West Indian bishoprics, but it is no longer used.

The position of clergy of these Churches as regards the English Church is a matter which has been regulated by Parliament, and under present conditions would be dealt with by Church Measures. As above noted, the growth of Indian autonomy has resulted in the change of status of the Church in India. All these churches can, of course, subject to the conditions by which they have bound themselves, alter their tenets, but for the present they remain in communion with the Church of England.

Since 1865 it has been the practice, when a colonial bishop is consecrated in England, to issue a licence under the sign manual and signet for the consecration. So we may note that authority for the consecration of a bishop may proceed from the Crown in five ways.

<sup>1</sup> *Merriman v. Williams* (1882), 7 App. Cas. 484. See Clarke, *Constitutional Church Government*, pp. 321-40.



(1) For an English bishop, a licence to elect (*congé d'élire*), followed by a mandate in the form of Letters Patent for his confirmation and subsequent consecration. The bishop then has the jurisdiction conferred by the ecclesiastical law.

(2) For a suffragan bishop, under the provisions of 26 Hen. VIII, c. 14, there must be first a submission to the Crown of two names by the bishop who desires the assistance of a suffragan. Then the Crown by Letters Patent requires the archbishop of the province to do what may be required to confer the degree and office of bishop upon that one of the two persons named whom the Crown may choose. The bishop so created has such powers as may be committed to him by the bishop of the diocese wherein he is to act.<sup>1</sup>

(3) For an Indian bishop, Letters Patent were formerly granted, conferring the dignity and the jurisdiction, under the provisions of the Statutes above cited.

(4) For a colonial bishop, a licence is issued under the sign manual. The following form may serve as an illustration:

George by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, to the most Rev. Father in God, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, Greeting.

Whereas you the said Archbishop have humbly applied to Us for our Licence by Warrant under our sign manual and signet, authorizing and empowering you to consecrate our trusty and well-beloved \_\_\_\_\_ to be a bishop to the intent that he should execute his functions in one of our possessions abroad: Now it is our will and pleasure and we do by this our licence under our sign manual and signet authorize and empower you to consecrate the said \_\_\_\_\_ to be a bishop: and we do further authorize and empower you to do, perform and execute all and singular those things which belong to your pastoral office in respect of such consecration as aforesaid, according to the laws, statutes and canons in this behalf made and provided.

Given at our Court at                    this                    day of                    , 19                    .

By His Majesty's command.

(The warrant is countersigned by the Secretary of State  
for the Colonies.)

<sup>1</sup> By 51 & 52 Vict. c. 56 the Crown has power by Order in Council to direct what towns are to be the sees of bishops and suffragans. A suffragan

In the case of a bishop consecrated for the purpose of discharging episcopal functions in foreign countries a licence is issued in nearly the same form ; differing in this, that it recites Acts<sup>1</sup> by which consecration for such purposes was rendered lawful without the issue of a licence to elect or mandate for confirmation, and solely on the authority of a licence by sign manual warrant. The warrant is also issued from the Foreign Office instead of the Colonial Office, and is countersigned by the Secretary of State for Foreign Affairs.

In Scotland, Wales, Ireland, and in the British possessions outside England a bishop may be consecrated by other bishops without licence from the Crown.

A number of colonial bishops and bishops in foreign countries are subject to the Archbishop of Canterbury, but the extent of his authority is uncertain.

has not in law a diocese, but occupies a quasi-episcopal position as regards a particular area in a diocese ; see *Smith, In re ; Trevor v. Goodhall* (1934), 51 T.L.R. 108.

<sup>1</sup> 5 Vict. c. 6, amending 26 Geo. III, c. 84.

## CHAPTER XII

### THE CROWN AND THE COURTS

IN treating of the Crown and the Courts it is more than ever necessary to recollect that we are treating them from the point of view of the central government. The King is 'over all persons in all causes, as well ecclesiastical as civil, within his dominions supreme'. The King is the 'fountain of justice'. It will be sufficient to treat especially of the judicial organization of England and Wales, and to pass over lightly the Courts of Scotland, Ireland, of the Empire Overseas, and of the foreign jurisdictions, chiefly insisting on the manner in which all the threads of justice are drawn together and unite in the two great Courts of Final Appeal.

The subject for this purpose may be arranged as follows:

Section I. The civil and criminal jurisdictions merged in the Supreme Court.

Section II. The constitution of the Supreme Court of Judicature.

Section III. Inferior civil and criminal jurisdictions.

Section IV. Jurisdictions outside the High Court.

Section V. The Courts of Final Appeal.

Section VI. The Crown in relation to the Courts.

#### I. JURISDICTIONS MERGED IN THE SUPREME COURT

##### § 1. HISTORY OF THE COURTS

The beginnings of the distinction between civil and criminal jurisdictions are matters of history too remote for our present consideration. It is enough to note present differences. The civil jurisdiction protects private rights, the criminal jurisdiction punishes offences against public order or well-being.<sup>1</sup>

<sup>1</sup> Certain offences are made the subject of criminal proceedings, though not of the moral character which we associate with a crime, because they constitute an injury or failure of duty to the public and cannot be dealt with as a matter of private wrong, e.g. an indictment of a local authority for non-repair of a highway. Certain others are made subjects of civil proceedings to recover a penalty, in order to prevent a pardon from interfering with public rights, e.g. the penalties imposed by the Habeas Corpus Act and those for disqualified persons voting in the House of Commons.

The object of a civil action is to secure a right or obtain compensation for its infringement: the object of a criminal suit is to obtain punishment for the offender. Only the person interested may set in motion the course of civil justice, but a crime is against the peace of our Lord the King: a prosecution may normally be begun by any one in the King's name. In a civil case the party complaining may forgo his rights, but the King cannot exonerate his adversary. In a criminal case the party injured cannot condone the offence done to the public, so as to stop a prosecution, but the King can do so by staying proceedings or by exercising the prerogative of mercy. Distinct as are civil and criminal proceedings at the present day, we cannot expect to find them so in the early days of legal history. The State was not strong enough to punish offences against order. The utmost it could do was to regulate the action of the individual in redressing injuries.

The King is not, historically, the fountain of justice. The peace, that is the order in which men should live, was not in the first instance the King's peace. Self-redress, the maintenance by the individual of his own peace, gave way to or was reinforced by the peace of the folk: the peace of the folk, as the kingdom settled, became the peace of the King.<sup>1</sup> But no sooner had the peace of the King become the national peace, than the decentralization of justice began again, as the King granted jurisdiction to great lords over their lands.

In Saxon times we may say that justice was a matter of State concern to this extent, that the King was the guardian of the nation's peace; that, where he granted away his jurisdiction over localities, he reserved to himself the power to deal with certain offences, the 'Pleas of the Crown', and that in matters of civil right the King and witan were in effect a court of final appeal from the local courts of the hundred and shire, wherein the folk-right was in the first instance declared.

Feudalism still further localized justice: the lord of lands had jurisdiction over the dwellers on his lands. But the administrative genius of the Norman Kings, and their strenuous determination that their justice should prevail against the local justice, did more than counteract the tendencies of feudalism. First the secular and spiritual juris-

<sup>1</sup> Stubbs, *Const. Hist.* i. 181, 185.

dictions were separated, and thus, besides matters which merely concerned the clergy, the ecclesiastical courts acquired a jurisdiction over such matters as tithe, and over testamentary and matrimonial causes where temporal and spiritual interests converged. These had hitherto come before the bishop in the shire moot. Then the appellate jurisdiction of the Curia was developed more completely than heretofore, and the practice of issuing writs or mandates brought the local officer into connexion with the central government. The King himself sat thrice a year at least, and heard cases and dealt out justice.

But generally the business of the Curia was to hear appeals from the local courts of the hundred and shire, to deal with cases (1) in which the King's interest was concerned, or (2) in which two of the King's tenants-in-chief were parties, or (3) by special favour with cases in which two subjects not being tenants-in-chief were parties.

Writs, whether for directing local inquiry or for bringing cases before the King and his Court, emanated from the Curia: and throughout the reigns of Henry I and Henry II itinerant justices were sent on commission to represent the Curia for purposes of justice and finance in the shires. Compared with the procedure of the Courts of the shire and manor the justice done by the King's Courts was found to be more prompt and effective and as cheap and convenient. In the end the King's justice prevailed, and from the Curia the modern courts slowly emerge.

In 1178 two clerks and three laymen were appointed who should hear of the complaints of the people and should not depart from the Curia Regis: they were to reserve cases of special difficulty for the King himself. This provision secured in permanence a staff devoted to the administration of justice, though individually no longer interchangeable with the financial staff of the Exchequer, and with the itinerant justices who went on the ever-varying circuits organized by Henry II.<sup>1</sup>

The practice suggests the beginning of a distinction in the Curia between the cases heard *coram rege* and those dealt with

<sup>1</sup> Stubbs, *Const. Hist.* i. 601, 602. See Adams, *Origin of English Const.*, pp. 136-43; Holdsworth, *H.E.L.* i. 51-4, 195-203; Maitland, *Select Pleas of the Crown*, p. xxii. The value of this tradition is disputed.

in his absence. A further step was made in the specializing of the judicial functions when suits between subject and subject, *communia placita*, were ordained by the 17th article of Magna Carta to be held in some certain place. Thus arose the Court of Common Pleas or the *Common Bench* as distinct from the *King's Bench*, but a real distinction is not proved before 1237.

The function of the Exchequer had always involved some inquiries of a judicial character, and, while it became a department distinct from others, it did not cease to be a court for revenue purposes.<sup>1</sup>

Before the end of the thirteenth century comes to a close, we can see the three great Common Law Courts as they existed until the Judicature Act came into operation in 1875. The King's Bench dealt with all cases in which the King's interest or prerogative was concerned; the Common Bench with suits between subjects; the Exchequer with cases arising out of the collection of revenue.

But the King's Bench and the Exchequer desired to enlarge their jurisdictions. It was useless to pass a statute in 1300 forbidding the Exchequer to deal with Common Pleas except in so far as they might touch the King or the ministers of the Exchequer. Fictions were introduced into the pleadings of each Court, by which common pleas were brought within their cognizance, and, while each retained its special business and some matters remained special to the Common Bench, all three Courts became, in the fourteenth century, for most purposes accessible to all.

But by the side of these Courts arose a department of government which was hereafter to acquire important judicial functions.

In the history of the gradual break-up of the Curia Regis the severance of the Chancery from the Exchequer was one of the most important incidents. Writs had hitherto issued from the Curia, but when the Chancery became a separate department such documents as required to be authenticated with the Great Seal would thenceforth issue from the Chancery, which was now the *officina brevium*.

The Chancery, however, did not remain a merely adminis-

<sup>1</sup> Baldwin (*The King's Council*, p. 217 f.) stresses the fact that initially the Curia in the Exchequer exercised a general jurisdiction.

trative department. When the three Common Law Courts had been developed out of the Curia there was still a residuary judicial power in the Crown. Those who were dissatisfied with the decisions of the Courts petitioned the Crown in Parliament, alleging error. Hence came the appellate jurisdiction of the House of Lords. But there were those who did not complain that the Courts were wrong, but that they could not afford the needed redress. Such complainants petitioned the Crown in person or the Crown in Council. The mode in which the Council dealt with such petitions has been described elsewhere,<sup>1</sup> but at an early date it became customary, where the King's grace might be vouchsafed to the petitioner, to refer the matter to the Chancellor. The Common Law Courts could order the restoration of land, and, in some cases, of chattels to the rightful owner, and could give damages for a contract broken, or injury sustained. The Chancellor did not meddle with the more remote remedy of damages: his procedure went directly to the root of the grievances complained of. The Common Law Courts could say: 'You shall pay or restore because of your wrongful act or omission.' The Chancellor could say: 'You shall carry out your undertaking—you shall refrain from your contemplated wrong.' Thus where it was desired to enforce the performance of a contract, or to set aside a transaction induced by fraud, or to compel one who had acquired land under the conscientious obligation that he would hold it to the use of another to carry out the terms of his trust, the Chancery was the resort of the suitor.

Thus arose equity, supplementing the common law, acting always *in personam*, not awarding damages, or touching property, set in motion not by writ but by bill containing a petition addressed to the Chancellor: thereupon the individual was summoned by writ of *subpoena*, and bade to do, on pain of attachment, what a just and honest man would be expected to do under the circumstances of the case. Naturally the two systems come into conflict, for, while in form equity respected the rules of common law, in fact it worked to counteract their defects to which exponents of the common law were often blind.

The vague summons by *subpoena* with no cause of action<sup>2</sup>

<sup>1</sup> Pt. i, p. 80.

<sup>2</sup> Cf. Baldwin, *The King's Council*, pp. 227, 289, 339, 341.

shown was one of the earliest grounds of complaint. The evils of interference with the common law relating to land are recited in the preamble to the Statute of Uses. The ground of conflict in the succeeding century was the claim of the Chancery, rendered victorious by James I on the advice of Bacon as against Coke, to restrain the successful suitor in proceedings at common law, by injunction, from taking the benefit of his judgment.<sup>1</sup>

The gradual definition of equitable rules and procedure which was effected between the Chancellorships of Lord Nottingham and Lord Eldon must not detain us: we are concerned with the composition of the Courts, not with the law administered.

In order to get a clear notion of the various jurisdictions merged in the Supreme Court, we must touch upon a matter to which we shall recur, and must mention a jurisdiction which is still in some respects extraneous to the Supreme Court.

The Ecclesiastical Courts when severed from the secular courts carried with them some matters of a secular character—wills of personal property, the administration of the estates of those who died intestate, and matrimonial causes. The jurisdiction in these matters was, in the year 1857,<sup>2</sup> transferred to other tribunals, the Probate Court, and the Court for Divorce and Matrimonial Causes.

There remains but one more civil jurisdiction of those which now are merged in the Supreme Court. The Court of the Lord High Admiral or his deputy had a customary jurisdiction, defined in the reign of Richard II<sup>3</sup> as relating to all manner of injuries committed at sea, not within the precincts of any county. It had, further, a special jurisdiction conferred by commission to adjudicate on prizes of war, and a criminal jurisdiction of which more hereafter.

## § 2. COURTS OF FIRST INSTANCE IN 1873

We have indicated the origin of the Courts which were merged in the Supreme Court of Judicature; it must suffice

<sup>1</sup> See for a short and clear account of these struggles, Kerly, *History of Equity*, pp. 112–17; Holdsworth, *H.E.L.* i. 460–4.

<sup>2</sup> 20 & 21 Vict. cc. 77 and 85.

<sup>3</sup> 13 Rich. II, c. 5, and 15 Rich. II, c. 3.



to add a bare account of the Courts, their jurisdictions and their judges as they existed in 1873, and for the moment to deal only with civil jurisdiction.

The common law jurisdictions were those of the three great Common Law Courts.

The *King's Bench* was the first in rank of the Common Law Courts. There the King was always presumed to sit in person. It could deal with all suits between subject and subject. There were also certain matters special to the Court: the prerogative writ of *mandamus*, commanding magistrates, or others exercising inferior jurisdictions, to discharge a duty: proceedings commenced by the law officers of the Crown, having the effect of the ancient writ *quo warranto*, by which title to the enjoyment of an office could be tried.

The *Common Bench* or *Common Pleas* had a general jurisdiction in suits between subject and subject, a special jurisdiction in some formalities which survived the abolition of the real actions and the practice of fines and recoveries, and a special jurisdiction by way of appeal from the decision of revising barristers, and in questions of law arising out of disputed returns under the Parliamentary Elections Act, 1868.

The *Court of Exchequer* lost its equitable jurisdiction in 1841,<sup>1</sup> and was in 1873 a court of revenue and a court of pleas, dealing in the first capacity with the rights of the Crown against the subject, in the second, with all suits except such as were special to the other Common Law Courts.

The *Court of Chancery*, from the time that the Court of Exchequer lost its equitable jurisdiction, had the exclusive dealing with the entirety of the remedies and rights which had grown up under its care. Efforts to apply equitable remedies in the Common Law Courts had failed of success.

The *Admiralty Court* with a jurisdiction defined and extended by 3 & 4 Vict. c. 65, and 24 & 25 Vict. c. 10, dealt with injuries committed and contracts wholly arising at sea, following rules derived in great part from the civil law.

The *Court of Probate* had absorbed all ecclesiastical and other jurisdictions to grant or revoke Probate of Wills or letters of administration of the effects of deceased persons.

The *Court for Divorce and Matrimonial Causes* had in like

<sup>1</sup> 5 Vict. c. 5.

manner acquired all jurisdictions previously existing in such causes, and followed the procedure of the Ecclesiastical Courts, except as to the new law and practice, prescribed in 20 & 21 Vict. c. 85, concerning the dissolution of a valid marriage, as opposed to mere annulment of an invalid marriage.

Each of the Common Law Courts, until the year 1830, consisted of four judges—a chief justice and three *puisne* judges in the King's Bench and Common Pleas; a chief baron and three barons of the Exchequer. In 1830 a fourth *puisne* judge was added to each Court, and a fifth in 1868.

The Chancery, as a Court of justice, was manned, until the commencement of the last century, by the Chancellor and the Master of the Rolls, who, from being the chief of the Masters in Chancery, and mainly concerned with the custody of documents, began in the time of Wolsey to discharge the functions of a judge, in aid of the Chancellor. But the theory that he was the Chancellor's deputy was so far sustained that he only sat when the Chancellor was not sitting.<sup>1</sup> For the Chancellor himself *was* the Chancery for judicial purposes; as equitable remedies became more popular, or at any rate more widely used, and the business of the Chancery increased, it became necessary to appoint other judges, but these were merely instruments for discharging duties which the limits of human capacity prevented the Chancellor from discharging in person.

Therefore in 1813 it became necessary to create a new Court of first instance in Equity, that of the Vice-Chancellor of England. In 1841 the equitable jurisdiction of the Court of Exchequer was taken away, and two more Vice-Chancellors were appointed. Thus in 1873 there were as Courts of first instance in Chancery, the Chancellor, the Master of the Rolls, and three Vice-Chancellors.

The Admiralty Court was presided over by a single judge, but it was provided in 3 & 4 Vict. c. 65 that the Dean of Arches might sit for the judge, and as a matter of fact the Dean of Arches and the judge of the Admiralty Court were

<sup>1</sup> There seems to have been some dispute as to the jurisdiction of the Master of the Rolls, and after he had acted for two centuries as a judge an Act was passed (3 Geo. II, c. 30) to settle all doubts on the subject.

the same person. The functions of the Dean of Arches fall under another section.

The Act which constituted the Probate Court empowered the Crown to appoint a judge of the Court; and the Act which constituted the Court for Divorce and Matrimonial Causes manned it with a staff consisting of existing judges, of whom the judge of the Court of Probate was to be the Judge Ordinary.

### § 3. COURTS OF INTERMEDIATE APPEAL IN 1873

From all these Courts, except the Admiralty and Probate Courts, there was an intermediate appeal, before reaching the Court of final appeal.

From the three Common Law Courts, error or appeal lay to the Exchequer Chamber,<sup>1</sup> a Court constituted by 11 Geo. IV and 1 Will. IV, c. 70, s. 8, and composed of judges chosen from the two Courts whose decision was not in question.

From the Courts of first instance in Chancery an appeal lay to the two Lords Justices of Appeal sitting with or without the Chancellor. This Court came into existence in 1851<sup>2</sup> to relieve the Chancellor, who till then was the sole intermediate Court of appeal between the Courts of first instance in equity and the House of Lords, where he would also be required to preside.

From the Admiralty there was no intermediate appeal. Cases went direct to the final appellate jurisdiction of the Crown in Chancery, under 25 Hen. VIII, c. 19, and 8 Eliz. c. 5. This jurisdiction was transferred to the Crown in Council in 1832.<sup>3</sup>

From the Probate Court appeal lay directly to the House of Lords.<sup>4</sup>

From the Court for Divorce and Matrimonial Causes appeal lay from the Judge Ordinary to the full Court, whose decision was to be final, save in the case of a petition for dissolution of marriage, when appeal lay thence to the House of Lords.<sup>5</sup>

<sup>1</sup> The Court of Exchequer Chamber was first constituted a Court of Error by 27 Eliz. c. 8, because the long intervals between sessions of Parliament caused delay in getting decisions from the House of Lords.

<sup>2</sup> 14 & 15 Vict. c. 83.

<sup>3</sup> 2 & 3 Will. IV, c. 92.

<sup>4</sup> 20 & 21 Vict. c. 77, s. 39.

<sup>5</sup> 20 & 21 Vict. c. 85, ss. 55, 56. The full Court was the Chancellor, the

## § 4. CRIMINAL JURISDICTIONS

The Courts of Criminal jurisdiction which are merged in the Supreme Court, are those of the King's Bench, the Admiralty, and certain others which will presently be dealt with.

The King's Bench on its *Crown* side, as distinguished from its *Plea* side, could take cognizance of all crimes, or of all things done against the King's Peace. It could do this, and, with certain limitations, could bring up all indictments from other jurisdictions by writ of *certiorari*.

The Court of Admiralty had a jurisdiction over crimes committed on board ship, either on the sea or in the main stream of great rivers below bridge. But this jurisdiction had become practically unimportant, for by a series of statutes culminating in 24 & 25 Vict. cc. 96-8, all indictable offences committed at sea within the jurisdiction of the Admiralty of Great Britain or of Ireland are to be deemed the same in character and liability to punishment as though they had been committed in England or Ireland.

## § 5. THE CIRCUIT COMMISSIONS

The great courts of common law jurisdiction civil and criminal were localized, or rather centralized, at Westminster. But to bring all local causes to Westminster to be tried was hard alike on the suitor and the criminal.

Hence came the Courts held under *Commissions*, in virtue of which the judges made their *itineræ* or circuits.

Of these there were and still are three,<sup>1</sup> the Commissions of Assize, of Oyer and Terminer, of Gaol Delivery. The first conferred a civil, the two last a criminal jurisdiction.

The commission of assize, as its name implies, was designed in its origin for the trial of the real actions, but the judges who were sent on these commissions were, very early, given power to try other issues,<sup>2</sup> and the juries who were summoned to chiefs of the Common Law Courts, the senior puisne judge of each Court, and the judge of the Probate Court.

<sup>1</sup> The judges on circuit are sometimes said to sit in virtue of five commissions, made up by the addition of commissions of *nisi prius* and of the peace. But all the judges of the Supreme Court are in the commission of the peace for all counties, and *nisi prius* is an incident of the Commission of Assize.

<sup>2</sup> Stat. Westminster 2nd, 13 Ed. I, c. 30. 'Before the end of Edward the Third's reign, a series of enactments commencing with Magna Carta,

Westminster for the trial of such other issues were summoned conditionally, *nisi prius*, unless before the date of summons the justices commissioned to take assizes should come into the county.

Hence the commission of assize, in Blackstone's time, had come to mean, in practice, a duty to try 'common issues at *nisi prius*, hardly anything remaining of the real assizes except the name'.

The commission of *oyer and terminer* directs the judges therein named, or any two of them, the serjeants, King's Counsel, and other officers of the Circuit, to 'inquire, hear, and determine' concerning treasons, felonies, and misdemeanours within the counties named, 'as well within the liberties as without'.<sup>1</sup> The commission of *gaol delivery* is addressed to the same persons, and bids them 'deliver the gaol of — of the persons therein being'.

The practical difference between the two commissions seems to be that the first is to *inquire, hear, and determine*, and thus required a presentment by a grand jury before the judge can act. Thus he can only proceed on indictment found at the same assizes, whereas the commission of *gaol delivery* enables the judge to clear the gaols of such prisoners as he may there find.<sup>2</sup>

including the Ordinance for Justices, 20 Ed. III, cc. 1-6, and ending with 42 Ed. III, c. 11, had conferred upon the justices of assize extensive powers of control over the authorities of the counties through which they passed (see Crompton on Courts, 206 et seq.), complete jurisdiction over all criminal cases (the highest in constitutional importance), exclusive jurisdiction over certain real actions, concurrent jurisdiction with the Courts at Westminster to give judgment in others, and the power of trying at the most important stage all causes of the Courts of Westminster wherein questions were to be tried in the country, which, under the old law of venue, involved almost every disputed question of fact taking place elsewhere than in London and Middlesex. The Statutes which conferred these large powers and extensive jurisdiction before the end of the reign of Ed. III, are Magna Carta, c. 12, Westminster 2nd, c. 30, Statute of Justices of Assize, 21 Ed. I, 27 Ed. I, cc. 3, 4, 12 Ed. II, cc. 3, 4, 2 Ed. III, cc. 2, 16, 4 Ed. III, cc. 2, 11, 12, 5 Ed. III, c. 14, 14 Ed. III, st. 1, c. 16, 9 Ed. III, st. 1, cc. 4, 5, 20 Ed. III, cc. 1-6, and 42 Ed. III, c. 11.<sup>3</sup> *per* Willes J. *Fernandez, Ex parte*, 10 C.B., N.S., 46.

<sup>1</sup> A Liberty is a district over which the Crown has granted to an individual or his bailiff the execution of legal process exclusive of the sheriff. Means are taken at the present day to prevent inconvenience arising from such privileges.

<sup>2</sup> The early editions of Blackstone's *Commentaries* contain a Record of an indictment and conviction for manslaughter. The indictment is found

For Middlesex and the suburbs in Kent, Surrey, and Essex, standing commissions of oyer and terminer and gaol delivery have been issued since 1834, and judges sit monthly, in virtue of these commissions, to try prisoners at the Central Criminal Court or Old Bailey.<sup>1</sup>

Disputed questions of law arising in trials at *nisi prius*, whether before commissioners of Assize or judges at Westminster, went to the Court, in which the suit was begun, sitting *in banco*; thence in the course described above to the Exchequer Chamber and the House of Lords.

Disputed questions of law arising out of trials of indicted persons might be dealt with in one of two ways. They might be taken by writ of error,<sup>2</sup> but only where error was apparent on the record, to the Court of King's Bench; thence to the Exchequer Chamber; and thence to the House of Lords. Or issues might be reserved for the 'Court for Crown Cases reserved', whose decision was final. This Court based on the practice of the judges to discuss points of doubt with the other judges was constituted by 11 & 12 Vict. c. 78, and consisted of the justices of either Bench and Barons of the Exchequer or any five of them, of whom one must be the chief of one of the three Courts. It rested with the judge who tried the case to reserve a question of law, and he might only do so when the prisoner was convicted.

Until the Criminal Appeal Act came into operation in 1908 there was no appeal from a finding of facts in a criminal case save by application of the Home Secretary to advise the Crown to exercise the prerogative of mercy, except that from 1673<sup>3</sup> it was held that in the case of misdemeanour motion

a true bill by a grand jury before a judge sitting under a commission of *oyer and terminer*. The arraignment, trial, conviction and sentence take place at the next assizes under a commission of *gaol delivery*.

<sup>1</sup> 4 & 5 Will. IV, c. 36. It was the practice in the case of prisoners convicted and sentenced to death at the sittings in London before the Recorder, or afterwards before the Central Criminal Court, to make a report to the Sovereign before the sentence was carried into execution, and the decision was taken by the Sovereign in Council. This was discontinued at the commencement of Queen Victoria's reign, in pursuance of 7 Will. IV & 1 Vict. c. 77. The judge orders execution, and this is the sheriff's authority.

<sup>2</sup> This writ afforded little protection, for neither evidence nor summing up was on the record; Holdsworth, *H.E.L.* i. 215 ff.

<sup>3</sup> *R. v. Lathan and Collins*, 3 Keb. 143; cf. *R. v. Duncan* (1881), 7 Q.B.D. 198, 201.

might be made for a new trial on the ground of misreception of evidence, misdirection of the judge, or because the verdict was against the weight of the evidence.

It only remains to note certain ancient local Courts, the Court of Pleas at Durham, of Common Pleas at Lancaster, which by virtue of the *jura regalia* once granted to the lords of these counties palatine enjoyed a jurisdiction separate from the Westminster Courts.

We may now consider the effect of the Judicature Acts of 1873 and 1875, upon the jurisdictions with which we have dealt.

## II. THE SUPREME COURT OF JUDICATURE

### § 1. FUSION OF JURISDICTIONS

We have endeavoured in slight and imperfect outline to convey a general view of the Superior Courts as they existed in 1873, when the Judicature Act was passed, and until November 1875, when it came into operation together with the Amending Act of 1875. These Acts and later legislation have been consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925.

The Judicature Act (1873) in its first section took all these Courts and consolidated them into one Supreme Court of Judicature.

It then cut this Court into two permanent divisions, a High Court of Justice, and a Court of Appeal: and proceeded to confer jurisdictions upon each.

To the High Court of Justice was given all the jurisdictions previously exercised by—

The High Court of Chancery, as a Court of Common Law and of Equity:

The Courts of King's Bench, Common Pleas, and Exchequer:

The Courts of Admiralty, Probate, and Divorce:

The Courts created by Commissions of Assize, Oyer and Terminer, Gaol Delivery, or any such Commissions:

The Palatine Courts of Pleas at Lancaster and Durham.

By the Bankruptcy Act of 1883, jurisdiction in Bankruptcy<sup>1</sup>

<sup>1</sup> For its history see Holdsworth, *H.E.L.* i. 470-3.

was handed over to the Supreme Court, and the jurisdiction of the London Court of Bankruptcy set up in 1869 was assigned to the High Court of Justice.

To the Court of Appeal was given the jurisdiction and powers of the Lord Chancellor and Lords Justices of Appeal in Chancery, of the Court of Exchequer Chamber, and of the Privy Council in Admiralty appeals. Appeal also lies to it in Probate and Divorce appeals.

## § 2. DIVISIONS OF SUPREME COURT

We thus have two divisions of one great Court. The first exercising a general jurisdiction, civil and criminal, as a Court of first instance, and of appeal from inferior Courts: the other exercising a general appellate jurisdiction in civil cases from the decisions of the first.

Thus is concentrated, in one Court, equity and common law; the ecclesiastical and statutory jurisdictions enjoyed by the Courts of Probate and Divorce; the civil and criminal jurisdictions of the Court of Admiralty; the power to compel by *mandamus* the discharge of a public duty by persons or bodies on whom such duty may be cast; the power to restrain by *prohibition* an excess of jurisdiction by inferior Courts; the power by *certiorari* to take cases from them and bring them before itself.

And these wide powers include the criminal jurisdictions of the Court of King's Bench, of the commissions of *oyer and terminer* and *gaol delivery*, and of the Court for Crown Cases reserved.

To the jurisdictions thus concentrated by the Judicature Act in the High Court of Justice we must now add the Appellate jurisdiction in criminal cases conferred by the Criminal Appeal Act,<sup>1</sup> 1907, as amended in 1908<sup>2</sup> and 1925.<sup>3</sup>

The Court of Criminal Appeal there constituted consists of the Lord Chief Justice of England and the Judges of the King's Bench Division; any three or an uneven number form a quorum.

The jurisdiction extends over all cases of persons convicted

<sup>1</sup> 7 Ed. VII, c. 23.

<sup>2</sup> 8 Ed. VII, c. 46.

<sup>3</sup> Criminal Justice Act, 1925, s. 16.



on indictment, criminal information, or coroner's inquisition, and the person so convicted may appeal against his conviction on a point of law; or with the leave of the Court or on certificate of the judge who tried him, on a question of fact, or of mixed law and fact; or with the leave of the Court against the sentence passed on him when convicted, unless the sentence is fixed by law.

If the appeal be on a question of law, which the Attorney-General certifies to be of exceptional public importance, and that it is in the public interest that the decision should be further considered, there is a further appeal to the House of Lords. This certificate is very rarely given. The Court is not bound by a dissent of the Court of Appeal in a civil case.<sup>1</sup>

It should be noted with regard to this tribunal that it is a new Appellate Court constituted within the King's Bench Division; and that it supersedes all such other methods as existed for questioning the interpretation of the law in criminal cases.

The Act, which was largely due to the wrongful conviction of Adolf Beck, gives for the first time an appeal in criminal cases on questions of fact, and thus the character of a man who has been wrongly convicted may be cleared by a decision of the Court that the jury were wrong in their finding of the facts. Until the passing of the Act, an exercise of the prerogative of mercy by way of pardon was the only remedy for such a conviction, and a pardon necessarily assumes that there is something to be forgiven.

It remains to note that, although the Act provides an alternative to a petition for the exercise of the King's mercy, it in no way affects that branch of the royal prerogative. Only, it enables the Home Secretary either to refer a case submitted to him to the Court of Criminal Appeal (except an appeal against a sentence of death) or to obtain the opinion of the Court on any point arising out of the petition.

The Court of Appeal has not only an appellate jurisdiction in civil cases from decisions of the High Court, but also from jurisdictions outside the High Court, in matters of lunacy,

<sup>1</sup> See *R. v. Denyer*, [1926] 2 K.B. 258; *Hardie & Lane v. Chilton*, [1928] 2 K.B. 306; cf. pt. i, p. 313, above.

of bankruptcy, in cases arising in the Chancery Court of the County Palatine of Lancaster, and of Durham and formerly in the Court of the Vice-Warden of the Stannaries.<sup>1</sup> In 1934 appeals from County Courts were assigned to the Court of Appeal.

### § 3. DIVISIONS OF THE HIGH COURT

The Supreme Court is divided into a High Court and a Court of Appeal: the High Court is itself divided for the sake of convenience, and business of a special character is assigned to each *Division* of the Court.

In the first instance there were five such Divisions: Chancery; Queen's Bench; Common Pleas; Exchequer; Probate, Divorce and Admiralty. But in 1881 Queen Victoria by Order in Council exercised a power conferred on her by the Act of 1873 and merged the Common Pleas and Exchequer Divisions in that of the Queen's Bench.

The business assigned to each Division corresponds to its ancient jurisdiction, but the change effected by the Act is marked in two ways. (1) Any judge may sit in a Court belonging to any Division, or may take the place of any other judge. (2) Any relief which might be given by any of the Courts whose jurisdiction is now vested in the Supreme Court, may be given by any judge or Division of the Supreme Court: and any ground of claim or defence which would have been recognized in any of the old Courts may be recognized in any Division or by any judge of the new Court. Where rules of equity, common law, or admiralty conflict, the Act states which rule is to prevail in the future,<sup>2</sup> and in cases not specifically provided for enacts that, where law and equity conflict, equity is to prevail.<sup>3</sup>

But this is not the place to discuss the law administered or procedure adopted in the Supreme Court, further than is necessary to explain its constitution. We will note the points in which it comes into contact with the central executive.

<sup>1</sup> 36 & 37 Vict. c. 36, s. 18. The Vice-Warden's Court disappeared in 1896, the jurisdiction being given to the appropriate County Court; 59 & 60 Vict. c. 45.

<sup>2</sup> Act of 1873, s. 25. The provisions of sub-sections 3-7 now appear in the Law of Property Act, 1925, ss. 41, 98, 135, 136, 185.

<sup>3</sup> 15 & 16 Geo. V, c. 49, s. 44.

#### § 4. THE JUDGES OF THE SUPREME COURT

The High Court consists of three Divisions containing unequal numbers of judges. The Chancery Division consists of the Lord Chancellor, who presides, and six judges. The King's Bench Division contains the Lord Chief Justice of England, who presides, and since 1935 nineteen judges. The Probate, Divorce, and Admiralty Division has the President and two judges.

All these judges, save the Chancellor, are appointed by Letters Patent under the Great Seal; puisne judges on the advice of the Chancellor, other judges on that of the Prime Minister.

They are required to take the judicial oath and thereafter hold office during good behaviour, but may be dismissed on address of both Houses of Parliament. They are appointed to specific Divisions of the High Court, but any one may sit for another in any Division,<sup>1</sup> and the King may, by sign manual warrant, transfer a judge permanently from one Division to another.<sup>2</sup>

The Court of Appeal is composed of the Master of the Rolls and five Lords Justices similarly appointed.<sup>3</sup> It usually sits in two divisions of three judges, but for certain purposes two will suffice. Until 1881 the Master of the Rolls was a Judge of the High Court. Since the passing of 44 & 45 Vict. c. 68 he is a Judge of Appeal only. Since 1891 those who have served in the office of Lord Chancellor or Lord of Appeal in Ordinary are *ex officio* Judges of Appeal, but sit only if they consent to do so on the request of the Chancellor,<sup>4</sup> who may also ask any judge or ex-judge of the High Court to sit.

The King continues to issue the commissions under which the judges went on circuit before 1875, but the commissioner acting under such commission is to be 'deemed to constitute a court of the said High Court of Justice'. His powers are not, therefore, limited by the terms of this commission, for he can do, in respect of the matter brought before him, every-

<sup>1</sup> 15 & 16 Geo. V, c. 49, s. 4 (3).

<sup>2</sup> 15 & 16 Geo. V, c. 49, s. 4 (2).

<sup>3</sup> 15 & 16 Geo. V, c. 49, s. 6. The Lord Chancellor, the Lord Chief Justice, the President of the Probate, Divorce, and Admiralty Division, and the seven Lords of Appeal in Ordinary are members *ex officio*, if in the latter case qualified to be Lords Justices.

<sup>4</sup> 54 & 55 Vict. c. 53.

thing that a judge of the High Court sitting at Westminster could do.

The Judicature Act of 1875 conferred power on the Crown by Order in Council to alter the circuits, and two subsequent Acts gave powers of the same character for grouping counties for the purpose of Winter and Spring Assizes; these provisions are consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925. The circuits have undergone more change by this means since the Act came into operation than at any time since the reign of Henry II. They are at present eight; assizes are held in winter (January), summer (May), and autumn (October).

The same Act empowered the King by Order in Council, on recommendation of the Chancellor and certain of the judges, to make rules for the pleadings, practice, and procedure of the Supreme Court. The power thus given, the authority under which the rules are made, and the procedure for making them have since been modified. The Rule Committee consists of the Lord Chancellor, Lord Chief Justice, Master of the Rolls, four judges, two barristers, and two solicitors selected by the Lord Chancellor. The rules when made must be laid before both Houses of Parliament. Under these provisions a code of procedure was drawn up in 1883 and, with subsequent very important additions, is still in force. A consolidated edition has been issued.<sup>1</sup>

A Council of judges of the Supreme Court is required to meet annually<sup>2</sup> to consider the working of the Act and rules made under it, and defects and proposed amendments in the administration of justice, and report the same to the Home Secretary for the consideration of the Executive.

### § 5. THE IMMUNITY OF JUDGES

In the performance of their duties judges of the Supreme and other Superior Courts enjoy exemption from liability, civil or criminal, for any acts done or words spoken. 'This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to

<sup>1</sup> 15 & 16 Geo. V, c. 49, s. 99. Prior publication under the Rules Publication Act, 1893, is no longer requisite.

<sup>2</sup> 36 & 37 Vict. c. 66, s. 75; 15 & 16 Geo. V, c. 49, s. 210.

exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him ?<sup>1</sup> Instances of improper action on the part of judges of the Supreme Court are happily under present conditions unknown, but with reference to a colonial case it has been ruled by the Court of Appeal<sup>2</sup> following the Privy Council that 'no action lies for acts done or words spoken by a judge in the exercise of his judicial office although his motive is malicious, and the acts or words are not done or spoken in the honest exercise of his office'. Moreover it appears that judges of the Supreme Court will be deemed to be acting in the exercise of their office, even should they be acting in excess of their jurisdiction.

The principle of immunity extends also to judges of inferior courts, including a coroner and a Court martial,<sup>3</sup> but in the case of inferior Courts the immunity does not apply when the judge is acting beyond the limits of his jurisdiction.<sup>4</sup> But a judge will not be deemed to have acted beyond the limits of his jurisdiction if his action, though mistaken, is induced by false allegations of fact, which if true would have given him jurisdiction. The application of these principles to inferior judicial bodies is not without difficulty,<sup>5</sup> but need not here be further discussed.

### III. COURTS OF INFERIOR JURISDICTION

#### § 1. CIVIL COURTS

Until 1846 justice in civil cases was, as a rule, only to be obtained at Westminster, or by means of an action begun

<sup>1</sup> *Scott v. Stansfield* (1868), L.R. 3 Ex. 220, 223, *per* Kelly C.B. (County Court).

<sup>2</sup> *Anderson v. Gorrie and others*, [1895] 1 Q.B. 668, which follows the Privy Council ruling in *Haggard v. Pelicier Frères*, [1892] A.C. 61, 68 *per* Lord Watson.

<sup>3</sup> Cf. *Dawkins v. Lord F. Paulet* (1869), L.R. 5 Q.B. 94; *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255.

<sup>4</sup> *Houlden v. Smith* (1850), 14 Q.B. at p. 851 *per* Patteson, J.

<sup>5</sup> Cf. *Law v. Llewellyn*, [1906] 1 K.B. 487: immunity of justices of the peace when acting *judicially*; justices have generally a qualified protection under the Justices' Protection Act, 1848 (11 & 12 Vict. c. 44).

at Westminster and tried under a commission of assize on circuit.

The ancient county court had ceased to exercise any jurisdiction. The local courts were either courts in chartered towns<sup>1</sup> with limited powers, or courts of request, bearing the old title of the Court of Requests at Whitehall, but existing by virtue of Statute, to meet the needs of suitors, in towns which were willing to pay for such a convenience.

In 1846 was passed the first County Court Act, whereby the country was divided into circuits to each of which was assigned a local Court of Record. This Court was intended to enable small debts to be recovered cheaply and by a uniform mode of procedure. They were limited in jurisdiction by the amount of the sum recoverable and the character of the action brought; they have, however, gradually acquired from Parliament an extended jurisdiction in both respects, and are now not so much a relief to the poor suitor as to the judges of the High Court. But into this matter we need not enter. The judges of the County Courts, save in the Duchy of Lancaster, retire normally at age 72; they are appointed and may be dismissed by the Lord Chancellor, who appoints a committee of County Court judges who may with the approval of the Rule Committee of the judges make rules for their procedure. An appeal lies from their decisions to the Court of Appeal, and the Statutes respecting them were consolidated by an Act of 1888,<sup>2</sup> further amended, and again consolidated in 1934.

## § 2. CRIMINAL COURTS

The inferior criminal jurisdictions are those of the Justices of the Peace trying indictable offences at Quarter Sessions or exercising a summary jurisdiction.

<sup>1</sup> Such Courts of Record existing by virtue of special Acts were: The Mayor's Court of London (now the Mayor's and City of London Court; 10 & 11 Geo. V, c. cxxxiv); The Passage Court of Liverpool (see now 11 & 12 Geo. V, c. lxxiv); The Hundred Court of Record of Salford (see now 1 & 2 Geo. V, c. clxxii); The Chancellor's Court in the University of Oxford. Courts existed by charter in Bristol (the Tolzey and Pie Poudre Court), Derby, Exeter, Kingston upon Hull, Newark, Northampton, Norwich, Peterborough, Preston, Ramsey. There are twenty-eight others which do no business. Some have paid officers, in others the Recorder is also judge. See *Parliamentary Paper* (187) for 1888; Wilson, *Practice of the Supreme Court* (7th ed.), p. 121.

<sup>2</sup> 51 & 52 Vict. c. 43; 24 & 25 Geo V, c. 53.

Every county has its commission of the peace, but there are some exceptional cases. The three divisions of Yorkshire and Lincolnshire and the two of Suffolk and Sussex have separate commissions, and there are some '*liberties*' or excepted jurisdictions, corresponding to the '*peculiar*s' of the ecclesiastical world. On this commission are placed all the judges of the Supreme Court, all the members of the Privy Council, and such persons as the King, acting through the Lord Chancellor, may choose either on the recommendation of the Lord Lieutenant, who is now advised by a committee, or after inquiries made independently.<sup>1</sup> The Lord Lieutenant is, in practice, the Custos Rotulorum, the chief of the justices, and keeper of the records of the county.

We have elsewhere spoken of the administrative functions of the justice of the peace. His judicial duties are twofold. At Quarter Sessions, held four times a year, the justices of the peace form a court to try indictable offences with a jury, and to hear, without a jury, appeals from justices sitting as courts of summary jurisdiction, and on matters of rating, licensing,<sup>2</sup> and the administration of the Poor Law in the matter of pauper settlement.<sup>3</sup> The chairman, elected by the justices, takes the part of the judge at a criminal trial, but he is only the presiding officer and spokesman of the justices who form the court.

The summary jurisdiction of magistrates rests entirely upon Statute, is exercised in petty sessional divisions, and as such must be exercised by two justices sitting together.<sup>4</sup> But a single justice has certain limited powers.

It may explain what has just been said if we deal parenthetically and briefly with the person tried and his possible offence.

<sup>1</sup> The property qualification formerly necessary for a Justice of the Peace was abolished by 6 Ed. VII, c. 16.

<sup>2</sup> The Licensing Act, 1904 (see now 10 Ed. VII and 1 Geo. V, c. 24), has taken from Quarter Sessions the appeal which lay to them in cases where a licence was refused for no reason of misconduct or faulty construction, but because it was in excess of the requirements of the neighbourhood. Such matters are now dealt with by a licensing committee of justices, constituted under the provisions of the Act, which accords compensation, borne by a fund contributed to by licence holders in such cases.

<sup>3</sup> 8 & 9 Will. III, c. 30.

<sup>4</sup> See Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

Certain offences can, and others cannot, be summarily punished.

A man may commit or be suspected of having committed an offence that cannot be summarily punished. A single justice of the peace may then, after a preliminary examination, take such steps as will ensure that he is at hand when wanted for trial. This is done by commitment to prison or by taking bail for his appearance. An indictment is then framed. The offence may be triable at Quarter Sessions or it may be of a class reserved for a judge of the High Court sitting on Commission. The use of grand juries to find if the indictment is a true bill or not was abolished in 1933.

Thus there are (1) certain offences which may be tried by summary jurisdiction, by two justices sitting without a jury at petty sessions, or by a single justice. (2) Others cannot be so tried, but may be tried at Quarter Sessions with a jury. (3) Others again can only be tried by a Commissioner on circuit or judge of the High Court. (4) And there is yet another class of indictable offences, where the prisoner is given an option, whether he will be summarily tried by justices sitting at petty sessions, or committed for trial at Quarter Sessions or Assizes.

But as regards the connexion of inferior and central jurisdiction in criminal cases it is enough to say that an appeal by way of re-hearing lies under certain circumstances from a Court of summary jurisdiction to Quarter Sessions,<sup>1</sup> and that in all cases of conviction after indictment the prisoner may exercise the rights conferred by the Criminal Appeal Act, while in matters of rating and licensing the dissatisfied party may demand a statement of a case by justices for the decision of the High Court.

These forms of appeal are statutory, as is also the right to demand of justices at Quarter Sessions the statement of a case for the decision of the High Court.<sup>2</sup> But the High Court may be moved directly by application for a writ of

<sup>1</sup> See also Summary Jurisdiction (Appeals) Act, 1933.

<sup>2</sup> The appeal from the Court of Summary Jurisdiction to Quarter Sessions is an appeal on the merits of the case as well as on questions of law. But the statement of a case for the High Court, whether by justices at Petty Sessions or at Quarter Sessions, must be a statement of a question of law.



*certiorari* to quash orders in which justices had no jurisdiction or for a writ of *mandamus* to compel justices to discharge a duty cast upon them.

The borough magistracy must be distinguished from that of the County. Some boroughs have no Commission of the Peace. Then they fall under the jurisdiction of the shire. Some have a Commission of the Peace but no Quarter Sessions. Their justices then can only exercise a summary jurisdiction. Some have a Court of Quarter Sessions, but here the borough justices do not, as in the County, act as judges: The King appoints, and the borough pays, a Recorder, a barrister of not less than five years' standing, who with the jury of the borough tries such cases as are not reserved for the superior Courts. In 1934 about 122 boroughs had recorders.

The Stipendiary magistracy is an institution which took its rise in the metropolis, where a number of jurisdictions converged. The City of London, the City of Westminster, the Liberty of the Tower, each had a separate Commission of the Peace, while most of the vast aggregate of houses would fall under commissions for Kent, Middlesex, Surrey, and Essex.

To meet the difficulty a series of Acts<sup>1</sup> has constituted a body of paid magistrates, each of whom is in the Commission of the Peace for the four counties named, for Hertfordshire, Westminster, and the Liberty of the Tower. They do not sit together, but each has the power of two justices where two are needed for any judicial act.

For the Administrative County of London Quarter Sessions are held twice a month, and the County Bench is presided over by a paid Chairman or deputy Chairman.

A few towns have stipendiary magistrates with like powers, but unlike the London police magistrates, who are paid partly by the County of Middlesex, partly by the nation, the local stipendiary is paid by the locality.

All alike are appointed by the Crown on the advice of the Home Secretary, and hold office so long as the King is pleased to retain them in the Commission of the Peace.

<sup>1</sup> 2 & 3 Vict. c. 71; 3 & 4 Vict. c. 84. In 1935 there were 13 courts and 27 magistrates. Retirement is normal at age 72.

## IV. COURTS OUTSIDE THE SUPREME COURT

There are Courts which do not form part of the Supreme Court, nor does appeal lie from them to that Court.

But all, save two, are drawn together into one or other of the great Courts of Final Appeal. The two exceptions are the Court of the Lord High Steward and Courts martial.

## § 1. ANOMALOUS CRIMINAL JURISDICTIONS

A peer is entitled to be tried by his peers, if indicted for treason, felony, or *misprision*, that is, deliberate concealment of treason or felony. If the trial takes place when Parliament is not in session it takes place in the Court of the Lord High Steward.<sup>1</sup> A peer is appointed to this office *pro hac vice* by the Crown, by Letters Patent under the Great Seal, with commission to try the offence. The Lord High Steward is then required by 7 Will. III, c. 3, in the case of treason, or misprision of treason, to summon all peers who have a right to sit and vote, twenty days before the trial. He presides and determines finally any legal questions that may arise, but the judges may be summoned to assist the Court with their advice, if required. The unanimous<sup>2</sup> verdict of the peers (so as it be twelve in number in case of a conviction) decides the issue.

If Parliament is sitting a Lord High Steward is appointed in like manner, but he is then only a presiding officer, standing in relation to the other peers as the chairman of Quarter Sessions to the other justices of his Bench. A majority vote decides the issue; all peers may attend.

This Court—the remains of the old functions of the Great Council—seems to stand in no relation to the other Courts of law, except in so far as the indictment is found in an ordinary Court, and the accused peer may there plead a pardon. The indictment is moved by writ of *certiorari* into the Lords' House.<sup>3</sup>

<sup>1</sup> The interesting historical questions which concern the origin of this Court are fully discussed in the learned work of Vernon Harcourt, *His Grace the Steward and the Trial of Peers*; see Pike's review, *L.Q.R.* xxiii. 442, and the reply, xxiv. 43; Holdsworth, *H.E.L.* i. 388–90.

<sup>2</sup> 3 Co. Inst. 29–31. Each peer, however, gives an individual verdict. The last trial was that of Lord Delamere for treason (1686), 11 St. Tr. 510.

<sup>3</sup> The last instance of a trial in the Court of the Lord High Steward, the

Courts martial are also avowedly outside the ordinary course of law. But they are so far subject to the Supreme Court that they can be kept within the bounds of their limited jurisdiction by writ of *prohibition*; are liable to have a matter removed from their cognizance by writ of *certiorari*, if it be one in which they intrude on the jurisdiction of the High Court; may be required by writ of *habeas corpus* to set free a person improperly detained in custody; and may find their members made liable to actions for damages if they act in excess of their jurisdiction to the injury of another.

But the Courts martial are exceptional Courts permitted every year for a year by the Army and Air Force (annual) Act. While they act within their jurisdiction no appeal lies save to the superior authority, who by Statute has power to confirm the sentence or send it back for revision.<sup>1</sup> Naval Courts martial are authorized to impose sentences without confirmation and the Naval Discipline Act provides for their existence without annual enactment.

## § 2. ECCLESIASTICAL COURTS

The Ecclesiastical Courts stand in a different relation to the Supreme Court and the Court of Final Appeal. They too are liable to restraint upon excess of jurisdiction by writ of prohibition; but for the purpose of giving effect to their sentences they must have recourse to the procedure of the High Court, and they lead up to the final Court of Appeal in the Judicial Committee of the Privy Council. It is not necessary to deal with the history of the Ecclesiastical Courts from the time that the Conqueror severed them from the secular Courts. It will suffice to note the jurisdiction which they exercised in 1832, as being in point of power, though not perhaps in point of use, their medieval jurisdiction; and then to note the changes which have since taken place.

Lord Chancellor being appointed to this office *pro hac vice*, was the trial of Earl Russell for bigamy on the 18 July 1901. The proceedings are reported [1901] A.C. 446. The trial took place in the Royal Gallery, Parliament being in Session, and on this occasion all the Lords of Appeal were present, and eleven of the judges were in attendance. There was, however, no real point of law to decide, for the American divorce was patently null.

<sup>1</sup> 44 & 45 Vict. c. 58, s. 54. See p. 222 *ante*.

'The Ecclesiastical Jurisdiction', so ran the report of the Ecclesiastical Courts Commission of 1832, 'comprehends causes of a civil and temporal nature; some partaking both of a spiritual and civil character; and, lastly, some purely spiritual.

'In the first class are testamentary causes, matrimonial causes for separation and for nullity of marriage, which are purely questions of *civil* right between individuals in their lay character, and are neither spiritual nor affecting the Church establishment.

'The second class comprises causes of a *mixed* description, as suits for Tithes, Church Rates, Seats, and Faculties.

'The third class includes Church discipline and the correction of offences of a *spiritual* kind. They are proceeded upon in the way of *criminal* suits *pro salute animae*, and for the lawful correction of manners. Among these are offences committed by the Clergy themselves, as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations, and the like offences: also by Laymen, such as brawling, laying violent hands and other irreverent conduct in the church or churchyard, violating churchyards, neglecting to repair ecclesiastical buildings, incest, incontinence, defamation; all these are termed causes of correction, except defamation which is of an anomalous character.

'These offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesiae*, suspension from office, and deprivation.'<sup>1</sup>

The reduction of these topics has been considerable since 1832. Testamentary and matrimonial causes were removed to the Courts constituted by 20 & 21 Vict. cc. 77 and 85, and are now dealt with in the Probate, Divorce, and Admiralty Division. Suits for defamation were taken away by 18 & 19 Vict. c. 41; proceedings against laymen for brawling by 23 & 24 Vict. c. 32; incest is made a misdemeanour by 8 Ed. VII, c. 45; church rates have ceased to be compulsory; tithe has been commuted for a rent charge and its collection given to Queen Anne's Bounty by the Tithe Act, 1925; liability for dilapidations depends on an order to be made by a bishop; and jurisdiction in cases of perjury has been inferentially removed to the temporal courts.<sup>2</sup>

<sup>1</sup> Report of Ecclesiastical Courts Commission, 1832, set out in *Historical Appendix to the Ecclesiastical Courts Commission*, 1883, vol. i, p. 193.

<sup>2</sup> *Phillimore v. Machon* (1876), 1 P.D. 481.

But we will now go to the Courts by which this jurisdiction is administered.

(1) The Court of the Archdeacon is the lowest in the scale of the Ecclesiastical Courts. In jurisdiction it would seem at one time to have acquired power to deal with all such cases as might go before the Bishop's Court, but in practice the cases in which the Archdeacon's Court has been called upon to exercise its functions are rare in modern times.<sup>1</sup> The judicial powers of the archdeacon seem to be exercised in a summary way over matters connected with repairs of church buildings in his archdeaconry. These he may visit every year, and must visit once in three years.

(2) The Court of the Bishop or Consistory Court is next in order of the Courts Christian. His jurisdiction has been greatly affected by practice and Statute.

When the business of the spiritual courts grew, as it did rapidly after the Conquest, the bishops found that the judicial business cast on them was greater than they had time to transact. Hence the Courts of the archdeacons began to acquire more business and jurisdiction than was consistent with the authority of the bishop.

So the bishops delegated their judicial work to professional lawyers, their officials, chancellors, commissaries, or vicars-general. Such an officer was first appointed to hold at the pleasure, or for the life, of the bishop, then he came to hold for his own life, and in the eighteenth century it became the practice to make the appointment by Letters Patent under the seal of the diocese.

The Dean and Chapter in most dioceses ratify the appointment of the Chancellor or Vicar-General,<sup>2</sup> and the bishop is

<sup>1</sup> Phillimore, *Ecclesiastical Law* (2nd ed.), pp. 195-200. Cf. Holdsworth, *H.E.L.* i. 621 f.

<sup>2</sup> The Vicar-General seems to be the exponent of the more especially spiritual jurisdiction of the bishop. The Chancellor of the Diocese is described in patents as 'Vicar-General in spirituals and principal official.' It appears from evidence given before the Ecclesiastical Courts Commission (*Report*, ii. 83) that the Vicar-General exercised the bishop's jurisdiction over the clergy, while the principal official dealt with contentious cases and those of a temporal character.

In the case of bishops the offices are held by the same person; but the principal official and Vicar-General of an Archbishop are two different persons, and in the Court of Audience the Vicar-General represents the Archbishop.

thus excluded from resuming a power once delegated ; but in some dioceses the bishop reserves certain matters to be dealt with by himself.<sup>1</sup>

Statutes of the nineteenth and the present century have affected the jurisdiction of the bishop very vitally.

The Church Discipline Act, 1840,<sup>2</sup> provides a mode of dealing with offences, by persons in orders, against the laws ecclesiastical, or with scandal or report attributing such offences, and excludes any other form of criminal procedure.

The bishop in whose diocese the offence is alleged to have been committed may appoint a commission of five, of whom one must be his vicar-general, or an archdeacon or rural dean of the diocese. They may inquire, take evidence on oath, and report to the bishop. If there is found to be a *prima facie* case, the matter passes into the hands of the bishop in whose diocese the accused clerk is beneficed, wherever the offence may have been committed. The bishop may, before the commission has sat or reported, deal with the matter with the consent of the accused ; or he may after report try the case himself with three assessors, or he may and always did send the case by letters of request to the court of the province, that is, to the Archbishop's Court. So far as the Act of 1892 covers offences, it takes away the jurisdiction under this Act.<sup>3</sup>

The Act has affected the jurisdiction of the bishop in more ways than one. Directly, it supersedes all other modes of trying clerks for ecclesiastical offences, and requires the bishop to try the case in person, thus limiting his power of acting through a vicar-general or commissary. Indirectly, by giving power to send such cases to the provincial court, it has suggested the constant use of such a power, and so has brought into disuse the diocesan jurisdiction over such offenders.

The Clergy Discipline Act of 1892<sup>4</sup> enables the bishop to treat a preferment as void where a beneficed clergyman has

<sup>1</sup> See the *patents* of the officials principal, &c., of the provinces and dioceses of England and Wales, *Eccl. Courts Commission*, ii. 659-98.

<sup>2</sup> 3 & 4 Vict. c. 86. For such a commission at Liverpool see *Morning Post*, 14, 15 Dec. 1934.

<sup>3</sup> Thus simony is punishable under the Act of 1840, not that of 1892; *Beneficed Clerk v. Lee*, [1897] A.C. 226.

<sup>4</sup> 55 & 56 Vict. c. 32.

been convicted on indictment, or has been shown to have been guilty of immoral conduct by the result of legal proceedings under conditions specified in the Act. He is also empowered to appoint a tribunal, chosen in a prescribed manner, to try a clergyman on charges of immorality or offence against laws ecclesiastical not being a question of doctrine or ritual, and, subject to an appeal to the Court of the province or the King in Council,<sup>1</sup> to sentence him, if found guilty, to suspension or deprivation, with incapacity to hold preferment.

The Public Worship Act, 1874,<sup>2</sup> creates a procedure for offences against the ceremonial law of the Church: enabling the archdeacon of the archdeaconry, the churchwarden, or three parishioners of the parish, wherein the alleged offence has taken place, to make a representation to the bishop. The bishop may hold that no proceedings should be taken, or he may, if both parties will accept his decision without appeal, hear and decide the case. Otherwise it must be transmitted to the court of the province: with this we have now to deal.

(3) The Provincial Court is the Court of the Archbishop of the province. In the province of Canterbury until 1857 there were four such courts.

(a) The court of the official principal of the Archbishop decided cases on appeal from the diocesan courts; and cases of first instance either because sent by letters of request, or, before the Reformation, in virtue of the legatine authority of the Archbishop. The latter jurisdiction was restricted in 1532.<sup>3</sup>

The official principal was the Dean of Arches, so called because he held his court in Bow Church (*Sancta Maria de Arcubus*), thus taking the title of a subordinate judge whose office he absorbed.

(b) The original Court of Arches, dealing with cases arising in the thirteen parishes of London which were exempt from the jurisdiction of the Bishop of London and were 'peculiars' of the Archbishop.

(c) The Court of Audience, which dealt with matters reserved by the Archbishop for his personal jurisdiction.<sup>4</sup>

<sup>1</sup> *Wakeford v. Bishop of Lincoln*, [1921] 1 A.C. 821.

<sup>2</sup> 37 & 38 Vict. c. 85.

<sup>3</sup> 23 Hen. VIII, c. 9.

<sup>4</sup> It is presumably in the Court of Audience that the Archbishop sits as

These he decided for himself with the aid of assessors, or, if his vicar-general acted as judge, he acted not in his own name but in that of the Archbishop.

(d) The Prerogative Court, which exercised the testamentary and matrimonial jurisdiction vested in the Church Courts. Originally at Canterbury, about the Reformation it was moved to London and held at Doctors' Commons. Most of the business thence arising was done in the Provincial Courts, though the diocesan courts could deal with such cases. This jurisdiction was taken away in 1857, and conferred on the newly-constituted Probate and Divorce Courts.

The Courts of the Province of York were the Chancery Court, and, before 1857, the Prerogative Court; the former exercising the appellate and original jurisdiction in ecclesiastical matters.

The mode of appointment of the officials principal of the two provincial courts has been altered by the Public Worship Act of 1874. Before that Act each Archbishop made his appointment by Letters Patent under the archiepiscopal seal, the person designated having previously subscribed to the Thirty-nine Articles.

The Act of 1874 provided that the judge created for the purposes of the Act should be appointed by the two Archbishops, but that their appointment needed confirmation by the sign manual warrant of the Queen; and further that the judge so constituted should, as the places of officials principal in each province became vacant, enter upon those offices *ex officio*.

Thus the appointment of their officials principal by the two Archbishops is made subject to the approval of the Crown.

Here we must leave the Ecclesiastical Courts till we take them up again in dealing with the Courts of Final Appeal.

We must pass briefly over the courts in Scotland, Ireland, and overseas. Those of the Channel Islands and the Isle of Man have been dealt with above.

a judge of first instance to try a suffragan bishop of the province. For though Archbishop Benson, in the judgment in which he decided in favour of his jurisdiction in the case of *Read v. The Bishop of Lincoln* (1889), speaks of the Court of Audience as distinct from the Court in which he then presided, it is not easy to see what other provincial court would be appropriate; Roscoe, *Bishop of Lincoln's Case*, 33.



## § 3. COURTS OF SCOTLAND

The Scots Court of Session corresponds in Scotland to the Supreme Court of Judicature in England. It is the highest civil tribunal, and the jurisdictions of other Scots Courts, though not so completely merged in it as are similar English jurisdictions in that of the Supreme Court, have come to be exercised by its members.

The Court consists of a Lord President, a Lord Justice Clerk, and eleven Lords Ordinary, appointed by the Crown, who hold office during good behaviour, as in England. It is divided into an Outer and an Inner House. The Inner House sits in two divisions of four judges, the Lord President in one, the Lord Justice Clerk in the other. The Outer House consists of five judges sitting singly; its jurisdiction is subordinate to that of the Inner House. Important changes of procedure were sanctioned by the Administration of Justice (Scotland) Act, 1933, and enacted in 1934.

It should be noted that in Scotland the distinction between law and equity, which has been so marked a feature in the history of English law, has never existed, and that the jury to determine questions of fact in civil cases is a modern institution derived from England, and consists of a body of twelve. The jury in criminal cases is a part of the ancient procedure, and consists of a body of fifteen. The rule of majority decisions prevails in both cases. Moreover, in criminal cases a verdict of 'not proven' can be returned, which prevents further proceedings but does not assert innocence of the accused.

There are now absorbed into or associated with the Court of Session the following courts:

The Jury Court, which from 1815 to 1830<sup>1</sup> determined disputed questions of fact remitted to it from the Court of Session: it is now a department of the Court of Session for this purpose.

The Court of Exchequer, constituted at the time of the Union as a revenue court, from which error lay direct to the House of Lords: it is now<sup>2</sup> wholly merged in the Court of Session.

The Court of Teinds deals with the tithe of parishes

<sup>1</sup> 11 Geo. IV and 1 Will. IV, c. 69.

<sup>2</sup> 19 & 20 Vict. c. 56.

throughout Scotland. Its functions are partly administrative, corresponding in a very slight degree to those of the Ecclesiastical Commissioners in England, partly judicial, being concerned with the valuation of the tithe and the enforcement of payment. Its judges are the judges of the Inner House of the Court of Session and the Lord Ordinary on Teinds,<sup>1</sup> and its decrees are enforced by the process of the Court of Session, but it remains a separate court with a separate official staff.

The Court of Admiralty was a distinct court with a civil and criminal jurisdiction until 1830, when its civil jurisdiction was assigned to the Court of Session, its jurisdiction in matters of prize to the English Court of Admiralty, and its criminal jurisdiction to the Court of Justiciary.

The Supreme Criminal Court in Scotland is the High Court of Justiciary, of which the Lord Justice General is President. This office is now united with that of the Lord President of the Court of Session, in whose absence the Lord Justice Clerk presides, while the Lords of Session are also Lords Commissioners of Justiciary.

They sit singly, with a jury of fifteen, to try criminal cases, and in a court of two or more to review the decisions of inferior courts: from their decision there was no appeal until provision was made by the Criminal Appeal (Scotland) Act, 1926.

Circuits are held twice a year for civil as well as for criminal cases, for which purpose Scotland is divided into three districts.

The principal of the inferior courts of Scotland is that of the sheriff,<sup>2</sup> which enjoys a civil jurisdiction far more extensive than that of the county court mainly in England. In criminal cases they deal mainly with such offences as can properly be met with punishment not exceeding two years imprisonment with hard labour.

<sup>1</sup> See Scots Act, 6 Anne, c. 9; 2 & 3 Vict. c. 36; 15 & 16 Geo. V. c. 33, ss. 10, 41.

<sup>2</sup> Sheriffs principal have minor administrative duties and hear appeals from Sheriffs substitute, who are whole-time officers and carry out most of the judicial duties of the office. Appeals, however, may be brought direct to the Court of Session. See Sheriff Courts (Scotland) Act, 1907 (7 Ed. VII, c. 51). For tenure see ss. 11-13.

The sheriffs are appointed by the Crown, and hold office during good behaviour, but may be removed by a special procedure. Appeal lies to the Inner House of the Court of Session. A petty jurisdiction is exercised by magistrates and justices of the peace.

#### § 4. IRISH, INDIAN, AND OVERSEA COURTS

With the Irish Courts, their points of resemblance and difference from the English Courts, we do not propose to deal in detail. The superior courts of Northern Ireland fall under a Judicature Act passed for Ireland in 1877,<sup>1</sup> and the chief change is the addition of a Court of Criminal Appeal in 1930. The points of resemblance far exceed the points of difference in the superior courts; the inferior courts would take much more space to describe than is proportionate to the scope of this work.

The Irish Free State has remodelled its system; its final tribunal is the High Court; the Supreme Court has wide jurisdiction, exercised in criminal cases by one judge in Dublin as the Central Criminal Court. There is a Court of Criminal Appeal; Circuit Courts with a wide civil and criminal jurisdiction; and District Courts of minor criminal powers.<sup>2</sup>

The superior courts in India are the creation of the Indian High Courts Act of 1861.<sup>3</sup> This Act enabled the King to establish, by Letters Patent under the Great Seal, High Courts of Judicature for Bengal, Madras, Bombay, and the North-West Provinces (Allahabad). To these have been added<sup>4</sup> Courts at Patna (1916), Lahore (1919), and Rangoon (1922). Upon these courts may be conferred such jurisdiction, civil, criminal, Admiralty and Vice-Admiralty, testamentary, intestate and matrimonial, original and appellate, as the King may from time to time by Letters Patent direct.

The Colonial Courts are constituted (1) by the Crown either (a) in virtue of its prerogative, or (b) under statutory powers

<sup>1</sup> 40 & 41 Vict. c. 57.

<sup>2</sup> See Hanna, *The Statute Law of the Irish Free State*, pp. 20 ff.

<sup>3</sup> 24 & 25 Vict. c. 104, and see Ilbert, *Government of India*, pp. 126-8.

<sup>4</sup> 5 & 6 Geo. V, c. 61, ss. 101, 106, 113. There is a vast system of inferior Courts.

such as were conferred by the British Settlements Act, 1887, and similar Acts in the case of individual colonies; or (2) in the case of colonies with legislative institutions under the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5:

‘Every Colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony.’

The Dominion Courts are constituted under the legislative powers granted by their constitutions.

Admiralty Courts in the colonies have had a different history from others. Admiralty jurisdiction existed to deal with matters arising at sea, outside the purview of other courts, and Vice-Admiralty courts were established in many colonies by prerogative or Statute in the eighteenth century.<sup>1</sup> So the creation in the nineteenth century of Vice-Admiralty Courts in the colonies was not the establishment of a new jurisdiction, but of machinery for giving effect to one already existing.

Acts of 1863 and 1867<sup>2</sup> gave facilities for establishing such courts in all the colonies by instrument under the seal of the Admiralty, and these Vice-Admiralty Courts were emanations of the Admiralty Court at home. But in 1890<sup>3</sup> these imperial courts, existing side by side with the colonial courts, were abolished, and their duties and powers transferred, or the colonial legislatures were empowered to transfer them, to the colonial courts. The Statute of Westminster, 1931, authorizes the Dominions to regulate this jurisdiction at pleasure.<sup>4</sup>

<sup>1</sup> Keith, *Const. Hist. of First British Empire*, pp. 77–80, 261–5, 333 f., 343 ff. Criminal jurisdiction in Admiralty was given to colonial courts by 12 & 13 Vict. c. 96, extending older Acts.

<sup>2</sup> 26 & 27 Vict. c. 24; 30 & 31 Vict. c. 45.

<sup>3</sup> 53 & 54 Vict. c. 27.

<sup>4</sup> Keith, *Const. Law of British Dominions*, pp. 33, 265.

## V. THE COURTS OF FINAL APPEAL

The last resort of the suitor is to the Crown in Parliament or to the Crown in Council. To use more familiar terms, the final Courts of Appeal are the House of Lords and the Judicial Committee of the Privy Council.

We have noted the exceptional cases in which the decisions of the Court of Criminal Appeal are liable to review by the House of Lords, and the exceptional character of the criminal jurisdiction of the Court of the Lord High Steward and of the Courts martial. We may, therefore, consider that criminal law is excluded from this section unless specially named.

It remains to consider how the Courts with which we have dealt are grouped respectively under the House of Lords and the Judicial Committee of the Privy Council.

## § 1. THE HOUSE OF LORDS

The jurisdiction of the House of Lords rests now upon the Appellate Jurisdiction Act, 1876, of which the third section enacts that, subject to certain provisions in the Act, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following:

‘Of Her Majesty’s Court of Appeal in England; and (2) of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law and by statute; and (3) of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords at common law or by statute.’

The process by which the House of Lords became a Court of error from the English courts of common law, and a Court of Appeal from the English courts of equity, has been described above. It is enough, therefore, to say here that, with few exceptions, every litigant may obtain a review of any order or judgment of the High Court of Justice in the Court of Appeal;<sup>1</sup> and that from this last a final appeal may be brought by way of petition to the House of Lords. But such an appeal now requires the leave either of the Court of Appeal or the House of Lords.

<sup>1</sup> See, as to these, 15 & 16 Geo. V, c. 49, s. 31.

The suitor prays for a review of the order or judgment appealed against and that 'the order may be reversed, varied or altered, or that the petitioner may have such other relief in the premises as to *His Majesty the King in His High Court of Parliament may seem meet*'.

Error on the record, as distinct from appeal, is abolished.

The Scots Courts from which before the Act of Union an appeal lay to the Parliament of Scotland were the Courts of Session and of Teinds. No provision was made by the Act of Union for an appeal to the British House of Lords, but the jurisdiction of the House appears to have been accepted without very serious controversy.<sup>1</sup> Provision was made for error and appeal from the Scots Court of Exchequer constituted by 6 Anne, c. 26, s. 9.

Practically Scots Appeals came to the House of Lords from the Inner House of Session,<sup>2</sup> and the Act of 1876 has merely given statutory affirmation to existing practice.

As regards the appellate jurisdiction of the Irish House of Lords before 1720 there has been some controversy, into which it is not necessary to enter.<sup>3</sup>

The Declaratory Act of 1720 denied and took away the jurisdiction of the Irish House of Lords. The repeal of this Act in 1782 and the passing of the Act of Renunciation in 1783 restored and reaffirmed it.

The Act of Union in 1800 provided that:

'all writs of error and appeals depending at the Union or hereafter to be brought, shall from and after the Union be decided by the House of Lords of the United Kingdom.'

Such was the state of things to which the Appellate Jurisdiction Act applied. Later the Supreme Court of Judicature Act for Ireland (1877) constituted a High Court and a Court of Appeal for Ireland similar to those of England, and provided for an appeal from the latter Court to the House of

<sup>1</sup> MacQueen, *Appellate Jurisdiction of House of Lords and Privy Council*, pp. 286-8.

<sup>2</sup> Report of Committee of House of Lords on Appellate Jurisdiction, *Parl. Papers*, 1872 (325), p. 69.

<sup>3</sup> As to the case of *Annesley v. Sherlock*, and the precedents collected as to the jurisdiction of the House of Lords, see MacQueen, p. 92, and Appendix v, pp. 787-91. For another view of the matter see Lecky, *History of England*, i. 419.

Lords in all cases in which an appeal would have lain either to the King in Council or to the House of Lords from the Courts which were fused in the Irish Supreme Court. This system is still in substance in force in Northern Ireland.<sup>1</sup>

The composition of the Court of the House of Lords will be dealt with below.

## § 2. THE KING IN COUNCIL

The Appeal to the King in Council is not so simple of explanation as the appeal to the King in Parliament or House of Lords.

When the Long Parliament dissolved the Court of Star Chamber and restrained the jurisdiction of the Council, all powers which by any Statute were conferred upon the Star Chamber, or all or any of its judges, were taken away, and the Council was forbidden to deal, as it had dealt, with matters cognizable by the Courts of Common Law.

But the King in Council was still the resort of the suitor who could not obtain justice in any of the dependencies of the Crown, and the Act which took away the original jurisdiction of the King in Council at home did not touch petitions from the adjacent islands or the plantations.

From the very beginning of the fourteenth century receivers and triers of petitions had been appointed to aid the dispensation of justice in Parliament.<sup>2</sup> Of these there were two groups, one for Great Britain and Ireland, one for Gascony, the lands beyond the sea, and the isles. Their functions seem to have been distinct from those of the House of Lords as a Court of Error, and, though they continued to be appointed at the commencement of each Parliament until the summer of 1836, their office fell early into abeyance. For the lapse of time which intervened between sessions of Parliament after the middle of the fifteenth century bore hardly on the petitioner from beyond sea: and, if he appealed to the King in Council instead of the King in Parliament, his case was heard by the same persons (for the triers of petitions were members of the Council), and was dealt with more promptly.

The Channel Islands were the first applicants for justice in this form, and appeals from Jersey were granted in the reign

<sup>1</sup> See p. 16 *ante*.

<sup>2</sup> Baldwin, *The King's Council*, pp. 322 ff.

of Henry VIII.<sup>1</sup> Thenceforth the islands used this Court freely, by way of regular appeal from decisions which the suitor disputed as wrongly given, or by way of *Doléance* for an alleged denial of justice.

The plantations were the next applicants.<sup>2</sup> In 1661 a standing committee was appointed to hear appeals, and *doléances* from the Channel Islands, and in 1667 this duty was assigned, together with the hearing of appeals from the plantations, to the Committee for Trade and Plantations. In 1687 this Committee was made an open Committee of the whole Council, and in 1696 an Order was made that appeals were to be heard by a Committee of all the Lords or any three of them.

In 1716 an inhabitant of the Isle of Man appealed against a decree of Lord Derby, the feudal lord of the island, and the Council heard him on the ground, stated by Lord Chief Justice Parker, that the King in Council must needs have a jurisdiction in such a case to prevent a failure of justice.<sup>3</sup> The maxim that no one may be a judge in his own cause was then current.<sup>4</sup>

Thus one may say that down to the year 1833 all the petitions '*des autres terres et pays de par la mer et les isles*' were dealt with by an open Committee of the Privy Council, which advised the Crown as to the Order to be made in each case.

But in addition to these, the Council heard and determined matters relating to the custody of the person and property of lunatics. For the House of Lords had declined to deal with such cases, holding that the matter was one of royal prerogative entrusted by the King to the Chancellor.<sup>5</sup>

Besides these matters there was transferred to the Privy Council in 1832 the jurisdiction of the Court of Delegates in ecclesiastical and admiralty appeals.

It will be remembered that 25 Henry VIII, c. 19,<sup>6</sup> gave to the subject a right of appeal, for lack of justice in any of the

<sup>1</sup> MacQueen, *op. cit.*, p. 686.

<sup>2</sup> Keith, *Const. Hist. of First British Empire*, pp. 305-11.

<sup>3</sup> *Christian v. Corren*, 1 Peere Williams, 329.

<sup>4</sup> See Keith, *op. cit.*, p. 350, and cf. *Wingrove v. Morgan*, [1934] Ch. 423 (varied on appeal 431).

<sup>5</sup> 3 Peere Williams, 108, and note.

<sup>6</sup> The Act for the Submission of the Clergy; see p. 255 *supra*.



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courts of the archbishops of the realm, to the King in Chancery, who thereupon appointed delegates with a commission under the great seal to review and finally determine the matter in issue. The procedure was based on that existing in admiralty causes.

A similar court was provided by Statute for admiralty appeals in the reign of Elizabeth,<sup>1</sup> affirming existing usage.

In 1832 this form of appeal was taken away and the parties to admiralty and ecclesiastical appeals were referred for redress to the Crown in Council.<sup>2</sup>

In 1833 was constituted the Judicial Committee of the Privy Council.<sup>3</sup> Its jurisdiction is our present concern. To it were referred:

(1) All appeals or complaints in the nature of appeals made to the Crown in Council (s. 3).

(2) All matters which, arising in Admiralty or Vice-Admiralty courts in the dominions of the Crown, might heretofore have been taken by way of appeal to the Court of Admiralty (s. 2).

The Judicature Acts (which merged the English and Irish Courts of Admiralty in the Supreme Courts of the two countries) and the Appellate Jurisdiction Act transferred Admiralty appeals to the House of Lords. But the Vice-Admiralty Courts do not seem to have been thus affected. They are now merged in the Colonial Courts, whence appeals may lie under certain conditions to the Crown in Council.

(3) Any such other matter as the Crown may choose to refer to the Judicial Committee for hearing or consideration (s. 4).

The Act proceeds to confer upon the Judicial Committee various powers needed for the working of a court, as to taking evidence, enforcement of attendance of witnesses, and the carrying into effect of its orders. It was supplemented by the Judicial Committee Act, 1844,<sup>4</sup> which gave power to admit appeals from courts not being the final court of appeal locally, and authorized the regulation of appeals in every case by Order in Council. Rules of procedure have been made by Orders in

<sup>1</sup> 8 Eliz. c. 5.

<sup>2</sup> 2 & 3 Will. IV, c. 92, s. 3.

<sup>3</sup> 3 & 4 Will. IV, c. 49. For its composition see p. 327 *post*.

<sup>4</sup> 7 & 8 Vict. c. 69.

Council from time to time, and the amount in issue which makes an appeal permissible from the Indian and Colonial Courts has been fixed by such orders, by royal instructions, or by acts of colonial legislatures. In general the Court below can grant leave if it thinks it desirable in any case.

The Crown also may entertain any appeal, a rule which maintains the prerogative of the King to correct miscarriages of justice. But this rule is subject to statutory limitation, and the Statute of Westminster, 1931, has resulted in Canada cutting off all appeals in criminal causes, and the Irish Free State all appeals whatever.<sup>1</sup> Prior to this, certain limits existed and still remain as to appeals.

The Dominion of Canada and the Commonwealth of Australia have limited in certain directions this right of appeal. The Canadian Supreme Court Act (35 Vict. c. 11, s. 47),<sup>2</sup> and s. 73 of the Commonwealth of Australia Constitution,<sup>3</sup> provide that the judgments of the Supreme Court of Canada and of the High Court of Australia should be final, but without prejudice to the right of the Crown to grant special leave to appeal. The Judicial Committee has in a series of cases formulated the grounds on which they will advise the Crown to grant this leave.<sup>4</sup> But the Commonwealth constitution imposes a further restriction, and forbids any appeal on any question, however arising, which is a matter of federal jurisdiction and relates to the constitutional powers of the Commonwealth and States or of State and State *inter se*.

The Judiciary Act of 1903 of the Commonwealth Parliament invested the Courts of the States with a federal jurisdiction in certain cases, and enacted that in these cases the only appeal should be to the High Court of Australia.

The limitations thus imposed on the right of appeal to the King in Council came before the Judicial Committee for con-

<sup>1</sup> See p. 87 *ante*; *Moore v. Att. Gen.*, [1935] A.C.

<sup>2</sup> Re-enacted in the Revised Statutes of 1906 and 1927.

<sup>3</sup> 63 & 64 Vict. c. 12.

<sup>4</sup> These grounds may be generally stated; the matter must be one of public interest, or involving important questions of law, or property of a considerable amount; *Daily Telegraph Co. v. McLaughlin*, [1904] A.C. 779, and see *Prince v. Gagnon* (1882), 8 App. Cas. 103; *Wilfley Ore Syndicate v. Guttridge*, [1906] A.C. 548; *N.S. Wales Taxation Comm. v. Baxter*, [1908] A.C. 216.

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sideration, and it was held<sup>1</sup> that the Commonwealth could not cut off the appeal from a State Court on a matter which was legitimately within its jurisdiction. The High Court refused to accept this ruling, and the Commonwealth solved the matter by forbidding the State Supreme Courts to deal with such constitutional cases.<sup>2</sup>

Thus again, the act of a colonial legislature by which the decision of a Colonial Court in matters of insolvency was made final was held not to preclude the exercise of the prerogative in allowing an appeal as a matter of grace.<sup>3</sup>

Apart from limitations imposed by Statute which have received the assent of the Crown in Council or the Crown in Parliament, the King may, by virtue of the prerogative, confirmed by Statute, review the decisions of Colonial Courts civil and criminal,<sup>4</sup> of Courts created under treaty with a foreign power exercising jurisdiction in a foreign country,<sup>5</sup> and of Courts in mandated territories<sup>6</sup> and protectorates.<sup>7</sup>

In virtue of this prerogative the Crown has been advised to receive an appeal against the decision of a police magistrate in the Falkland Islands:<sup>8</sup> and again, against a decision of the Supreme Court of New South Wales granting a new trial in a case of felony;<sup>9</sup> but the mischief which might arise from allowing an appeal in criminal cases was adverted to in the cases just cited.

<sup>1</sup> *Webb v. Outrim*, [1907] A.C. 81.

<sup>2</sup> *Keith, Responsible Government in the Dominions*, ii. 1094 ff.

<sup>3</sup> *Cushing v. Dupuy* (1880), 5 App. Cas. 409.

<sup>4</sup> 1 Moore, P.C., N.S., 312.

<sup>5</sup> *Hart v. Gumpach* (1873), L.R. 4 P.C. 439, an appeal from the Supreme Court of China and Japan, created under the treaty of Tientsin.

<sup>6</sup> *Jerusalem and Jaffa District Governor v. Suleiman Murra*, [1926] A.C. 321.

<sup>7</sup> *Sobhuza II v. Miller*, [1926] A.C. 518.

<sup>8</sup> *The Falkland Islands Co. v. The Queen* (1863), 1 Moore, P.C., N.S. 299.

<sup>9</sup> *R. v. Bertrand* (1867), L.R. 1 P.C. 520. Criminal appeals are allowed virtually only where there has been gross irregularity of procedure or disregard of natural justice; see *Sutton v. R.*, [1933] A.C. 348; *Ras Behari Lal v. King-Emperor* (1933), L.R. 60 Ind. App. 354; *Akerele v. R.* (1934), 103 L.J.P.C. 91. In *Sheo Swarup v. King-Emperor* (1934), 51 T.L.R. 10, an appeal was allowed in order authoritatively to decide a point on which there were conflicting judgments in Indian High Courts as to the powers of appellate courts to review the trial judge's findings of fact in cases in which appeal is taken by a local government from an acquittal by a judge upon a matter of fact.

No such difficulty arose in the case of *ex parte Marais*, which was argued on a petition for special leave to appeal from a decision of the Supreme Court of the Cape Colony. The case raised the question whether, in a colony where a state of war prevailed and martial law was proclaimed in certain districts, a British subject arrested and imprisoned under martial law could claim to have his case heard by the Civil Courts, which were at the time open, but refused to entertain his complaint. The Judicial Committee advised the Crown that leave to appeal should not be given,<sup>1</sup> but the case illustrates the nature of the remedies afforded by the jurisdiction of the Crown in Council, for the question at issue was whether the Crown in Council should remit to the Courts of a Colony, for hearing, a case which they assumed that they could not entertain.

And conversely appeal may be made to the King in Council to declare the nullity of an assumed jurisdiction in the exercise of which a subject asserts that he has been wronged. Such was the case of Bishop Colenso in 1865.<sup>2</sup>

### § 3. THE COMPOSITION AND ACTION OF THE COURTS

In the House of Lords no appeal may be heard unless there are present not less than three persons who fall under the designation, given in the Act, of *Lords of Appeal*.

A Lord of Appeal may be (1) the Chancellor of Great Britain for the time being, (2) a Lord of Appeal in Ordinary, (3) a Peer of Parliament who has held high judicial office.

A Lord of Appeal in Ordinary is appointed by Letters Patent; he is entitled to a writ of summons to attend and to sit and vote in the House of Lords;<sup>3</sup> he enjoys the dignity of

<sup>1</sup> *Marais, Ex parte*, [1902] A.C. 109. It is impossible to read this decision without a regret that opportunity was not given for a fuller argument and consideration of a case in which the refusal of the Committee to advise an interference with the action of the Civil Courts of Cape Colony might have been put on more conclusive grounds.

<sup>2</sup> *The Bishop of Natal, In re* (1865), 3 Moore, P.C., N.S. 115. This, however, is a very special case. The power under s. 4 of the Act of 1833 has been used in varied cases, such as Canadian boundary issues, the removal of colonial judges, and the definition of Piracy *jure gentium*, [1934] A.C. 586.

<sup>3</sup> Until 1887 a Lord of Appeal when he ceased to exercise judicial functions lost his right to sit and vote. This has been corrected by 50 & 51 Vict. c. 70, s. 2.

a baron *for life*, a normal emolument of £6,000 a year, and holds office during good behaviour subject to removal on address by both Houses of Parliament. The number is at present seven, and they must be qualified by fifteen years' practice at the Bar, or two years' tenure of high judicial office.

'High judicial office' means 'the office of Lord Chancellor of Great Britain or Ireland, of a paid judge of the Judicial Committee of the Privy Council,<sup>1</sup> or a judge of one of His Majesty's superior Courts of Great Britain or Ireland'.

The composition of the Judicial Committee has been altered from time to time. It now consists of the Lord President, such members of the Privy Council as hold, or have held, 'high judicial office',<sup>2</sup> the Lords Justices of Appeal,<sup>3</sup> and two other persons being Privy Councillors, whom the King may appoint by sign manual warrant.<sup>4</sup> In substitution for older arrangements<sup>5</sup> provision is now made for two representatives with legal experience in India,<sup>6</sup> and for admission to the committee of all judges of the highest courts of the Dominions and States who are Privy Councillors.<sup>7</sup> The Church Discipline Act, 1840, provided that on ecclesiastical appeals under that Act such archbishops and bishops as were Privy Councillors should be members of the Committee, but the Appellate Jurisdiction Act has reduced them to the position of Assessors.<sup>8</sup> It is necessary that three members should be present at the hearing of a cause; and no member may attend unsummoned. The Committee may sit in divisions simultaneously.<sup>9</sup>

The mode in which the two Courts give their decisions indicates their characters as representing the Crown in Parliament and the Crown in Council. The House of Lords gives judgment, after hearing counsel, as part of the business of

<sup>1</sup> 39 & 40 Vict. c. 59, s. 25. The office, created by 34 & 35 Vict. c. 91, no longer exists. These members of the Judicial Committee have died and their places are supplied by the Lords of Appeal.

<sup>2</sup> 50 & 51 Vict. c. 70, s. 3.

<sup>3</sup> 44 & 45 Vict. c. 3.

<sup>4</sup> 3 & 4 Will. IV, c. 41, s. 1. H. H. Asquith was appointed under this power.

<sup>5</sup> Ibid. s. 30; 50 & 51 Vict. c. 70, s. 4. In 1935 one judge still was qualified to sit.

<sup>6</sup> 19 Geo. V, c. 8, s. 1. Retirement at age 72 is required.

<sup>7</sup> 58 & 59 Vict. c. 44; 3 & 4 Geo. V, c. 21; 19 Geo. V, c. 8; 18 & 19 Geo. V, c. 26.

<sup>8</sup> 3 & 4 Vict. c. 86, s. 15, and 39 & 40 Vict. c. 59, s. 14.

<sup>9</sup> 5 & 6 Geo. V, c. 92.

the House. A sitting of the House of Lords in its appellate capacity is a sitting of the House. The members of the House who take part in the decision move the House in turn that the appeal be allowed or dismissed, and that it be *ordered and adjudged* accordingly: the order and judgment are entered on the journals of the House.

A judgment of the Judicial Committee is a statement at length of the reasons<sup>1</sup> which determine them in 'humbly advising' the King to give effect to their decision. These reasons are not stated in the report to the King: this merely sets forth their conclusion and the method proposed for giving effect to it. When the report has been submitted to the King, and approved by him at a meeting of the Privy Council, an Order of Council is made reciting the report, and adopting it as the judgment of the King in Council.

Some matters remain to be noted in which these Courts differ from one another.

The judgments of the House of Lords express the individual opinions of the members of the Court: they are not therefore necessarily unanimous, and the public is made aware that there are differences of opinion in the highest Court of Appeal.

The Privy Council advises the Crown, and in so doing it is bound not to record dissentient opinion. The rule is not merely a matter of policy; it is one of the 'Orders to be observed in Assemblies of Council' made in 1627, never altered or repealed, and reaffirmed by Order in Council in 1878. It runs thus:

'In voting of any cause the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there; and when the business is carried according to most voices, no publication is afterwards to be made by any man how the particular voices and opinions went.'<sup>2</sup>

<sup>1</sup> They are required to be so stated by 3 & 4 Will. IV, c. 41, s. 3.

<sup>2</sup> There has been much controversy as to the observance of this rule. See the evidence of H. Reeve before the Committee of the House of Lords on *Appellate Jurisdiction*, 1872, pp. 23-6, and Lord Selborne's treatise on the *Judicial Procedure of the Privy Council*. Sir Walter Phillimore, in *The Times*, 28 Oct. 1891, at p. 3, published a list of cases in which dissent had been expressed, but, as the rule has been reaffirmed by Order in Council, the controversy is merely historical. Cf. also 3 & 4 Will. c. 49, s. 5.

The question whether or no a Court of Final Appeal ought to be unanimous or appear to be so is one of policy rather than of law. It does not at the first sight seem fitting that either Court should speak with an uncertain voice. But we must regard the practice of the House of Lords as settled; and to all intents the practice of the Privy Council is settled also, for a proposal in 1911 to allow of dissentient opinions was after full consideration rejected by the Dominion governments.<sup>1</sup>

The House of Lords holds itself bound by its decisions.<sup>2</sup> The Privy Council, like the Supreme Court of the United States, though a court of final appeal, does not consider itself to be precluded from advising the King to reverse a judgment previously given.<sup>3</sup>

It is uncertain if subordinate Courts should follow the Privy Council or a subsequent House of Lords judgment differing from the Privy Council.<sup>4</sup>

The House of Lords is entitled to the assistance of the Judges of the High Court to advise on questions of law; for the Judges receive, at the summons of every Parliament, a writ of Attendance 'to treat and give advice', and are bound to attend if called upon. But they are now rarely summoned. Formerly the House of Lords, for the formation of a Court of Appeal, was dependent on the presence of the Lord Chancellor, of one or more ex-Chancellors, and of eminent lawyers who might have been raised to the peerage with or without the tenure of high judicial office. The number of peers capable of taking part in the decision of difficult legal questions might at times be very small, and the assistance of the judges very necessary. Now that in addition to the presence of the Lord Chancellor, and the adventitious aid of unofficial Law Lords, there is always a Court of seven

<sup>1</sup> Keith, *Imperial Unity*, p. 382.

<sup>2</sup> This is extremely unfortunate where a decision has merely been reached on equality of votes, so that the judgment below stands; *R. v. Millis* (1844), 10 Cl. & F. 534.

<sup>3</sup> See cases mentioned by Reeve in his evidence before the Committee on *Appellate Jurisdiction*, p. 29, and also *Cushing v. Dupuy*, 5 App. Cas. 409, reviewing and practically overruling *Cuivillier v. Aylwin* (1832), 2 Knapp P.C. 72; and see *Read v. Bishop of Lincoln*, [1892] A.C. at p. 654; *Transferred Civil Servants (Ireland), In re*, [1929] A.C. 242.

<sup>4</sup> See Keith, *Journ. Comp. Leg.* xv. 261, 262.

Lords of Appeal, the assistance of the judges is rarely required: in fact they have been summoned but once in the last forty years, in 1897 in the case of *Allen v. Flood*,<sup>1</sup> when the Lords Justices of Appeal were also summoned. But no one can attend the Judicial Committee unless he be a Privy Councillor, and summoned.

## VI. THE CROWN IN RELATION TO THE COURTS

We have tried to describe the Courts through which the Crown administers justice to the subject. There are still some points to be considered before we conclude.

Admitting that all jurisdiction emanates from the Crown, we may ask whether the King can, at pleasure, create new, or interfere with the action of existing, jurisdictions.

And again, admitting that the King's Courts are open to all his subjects within their respective jurisdictions, we may ask to what extent and in what manner the Crown and its servants are amenable to the rule of law and the procedure of the Courts.

### § 1. THE CREATION OF JURISDICTION

To the first of these questions it would seem safe to answer that save in a conquered or ceded colony in respect of which the royal prerogative of legislation has not been surrendered, the Crown cannot create a new type of court, nor confer a new jurisdiction on a court already existing. This is a rule laid down by great writers and embodied in judicial decisions of the highest authority.<sup>2</sup> It is illustrated by the invalidity of the Letters Patent whereby the Crown endeavoured to create ecclesiastical jurisdictions in South Africa.

As regards the United Kingdom, the matter is one of merely historical interest. The Common Law Courts grew up without statutory sanction. So, too, did the equitable jurisdiction of the Chancellor. The interference of the Star Chamber and Privy Council with the ordinary course of the common law was a valid exercise of the jurisdiction of the

<sup>1</sup> [1898] A.C. 1. It must not be forgotten that they attended at the trial of Earl Russell, before the King in Parliament in July 1901. *Supra*, p. 309 note.

<sup>2</sup> 4 Co. Inst. 200; Comyns, Digest Tit. Prerog. D. 28; *The Bishop of Natal, In re* (1865), 3 Moore, P.C., N.S. 152.



King in Council and needed a statute for its abolition; while the Court of Requests, which met the requirements of the poor suitor, passed into disuse during the Commonwealth, and was not revived at the Restoration.<sup>1</sup>

These illustrations serve to show that the limitations on the power of the Crown laid down by Coke and Comyns and adopted by Lord Westbury, were not always in force; that they are part of the gradual definition of the prerogative described in the first chapter of this book.

But in the British possessions the matter might be and has been of practical importance. The powers of the Crown over conquered or ceded territory are doubtless very wide and would authorize the setting-up of courts of unusual character: but as regards settled colonies it seems clear that, unless statutory provision is otherwise made, the settlers take with them the common law of England; that the Crown can make provision for its administration by Order in Council or by Letters Patent in the form of a charter of justice,<sup>2</sup> but cannot create a court for any other purpose.

Where a legislature exists, the matter is now provided for by s. 5 of the Colonial Laws Validity Act, 1865.<sup>3</sup>

A question which arose some time before this Act was passed will furnish an illustration of the general rule.

A settled colony possessing a local legislature, Newfoundland, was in want of a court of equitable jurisdiction. The Governor, holding the seal of the colony, was regarded as Chancellor, but he declined to exercise the judicial functions of a Chancellor, to administer the King's grace by enforcing the performance of trusts or protecting the property of infants. The law officers were asked whether the King had power to constitute by Letters Patent a Master of the Rolls for the colony with an equity jurisdiction. They advised that this could not be done: but they made two suggestions.<sup>4</sup> One was

<sup>1</sup> *Supra*, pt. i, p. 80.

<sup>2</sup> *Jephson v. Riera* (1835), 3 Knapp, 130.

<sup>3</sup> It will be assumed that the power to appoint judges given by the Letters Patent to a Governor under a Parliamentary régime is intended to apply only when salaries have been assigned; *Buckley v. Edwards*, [1892] A.C. 387.

<sup>4</sup> Opinion of Sir J. Scarlett and Sir N. Tindal; Forsyth, *Cases in Constitutional Law*, p. 173. A like difficulty had been experienced in the case of Upper Canada, where equity jurisdiction in effect had to be given by local act. Cf. Keith, *Constitutional History of First British Empire*, p. 255.

that an officer should be appointed who should be Vice-Chancellor to the Governor and should use those equitable powers which the Governor declined to use. But they said: 'In order to prevent doubts on the subject, we would recommend this to be done *with the aid of Parliament or the local legislature.*' The other suggestion was that an additional judge should be added to the existing Common Law Court, who should be an equity lawyer, and that the Court so constituted should obtain, *by the authority of Parliament or of the local legislature*, so much of an equity jurisdiction as would meet the wants of the province.

With regard to Protectorates which, though they are not British territory, are in many cases practically under the sovereignty of the King, no such limitations exist to the power of the Crown, and provision is made by Order in Council for the administration of justice in such manner as the circumstances of the country concerned may require.

The interference of the Crown in the administration of justice may be said to have ceased when the Act of Settlement altered the tenure of the judges. When the judges ceased to be removable at the royal pleasure, they lost a motive for regarding the royal wishes in their administration of justice, and, when at the same time they were made removable on the address of both Houses, they acquired a motive for carefulness lest their conduct on the Bench should fall under the scrutiny of the High Court of Parliament.

There are indeed powers exercisable by the Crown through its law officers by which it has a control over judicial proceedings not available to the subject. But these are chiefly matters in which the property of the Crown is concerned; such as the right of the Crown to remove a case affecting its revenue from the Chancery to the King's Bench Division,<sup>1</sup> or its right as against a trustee in Bankruptcy to property of the debtor taken under an extent between the act of bankruptcy and the appointment of the trustee.<sup>2</sup>

To these matters the general rule applies that an existing prerogative of the Crown can only be taken away by express

<sup>1</sup> *Att. Gen. v. Constable* (1879), 4 Ex. D. 172.

<sup>2</sup> *Bonham, In re* (1879), 10 Ch. D. 595.

words in a statute. But beyond a statement of the principle it would not be desirable to go further into this topic.

In so far as the prerogative of mercy, exercised by reprieve, commutation of sentence, or pardon, constitutes an interference with the course of justice it has been dealt with elsewhere. It extends to pardon contempt of court.<sup>1</sup>

## § 2. CLAIMS BY AND AGAINST THE CROWN

### (a) *Proceedings by the Crown*

The Crown still possesses certain rights of an extraordinary character in order to enforce claims against subjects. These rights apply equally to the private business of the King and to official claims of government departments. Thus an information at the instance of the Crown or the Duke of Cornwall lies *in rem* to have the title of the Crown to property in its possession confirmed or its right to property held by a subject declared, or *in personam* to secure payment of a debt due to the Crown or in respect of intrusion on royal hereditaments. In proceedings to recover customs penalties the debtor may be arrested on a *capias* issued by authority of the Attorney-General and approved by a judge; he must then obtain release on giving bail. Proceedings to recover sums due to the Inland Revenue authorities can be started by a *subpoena* addressed to the debtor. But under legislation of 1933<sup>2</sup> debts may also be recovered by ordinary writ of summons and proceedings may be taken in the County Courts, subject to the usual limitations on their jurisdiction. The same Act provides in general for the grant of costs in cases between Crown and subject as between subjects, but due regard is to be paid to the obligation which the Attorney General or departments may have to share in proceedings, and any other party thereto may be ordered to pay the costs of the Crown.

The Crown may by writ of extent seize the body, lands, chattels or things in action of a debtor if there is risk of loss of the debt. The writ *Diem clausit extremum* is available for the case when a Crown debtor has died. Where a Crown debt is based on a record, a *scire facias* may be used, but an infor-

<sup>1</sup> *Re Bahama Islands Special Reference*, [1893] A.C. 138.

<sup>2</sup> 23 & 24 Geo. V, c. 36.

mation also lies. The Crown as represented by the Attorney-General<sup>1</sup> may claim a trial at bar of an information, has a general right of reply in *exchequer* cases,<sup>2</sup> and other lesser privileges.

(b) *Claims in Contract against the Crown*

In matters of contract the Crown submits to the jurisdiction of the Courts, but only on its own volition, the procedure being adopted from the practice adopted in the case of the recovery by the subject of lands and chattels in the hands of the Crown. It seems clear<sup>3</sup> that at a very early period the idea of suing the Crown directly was ruled out. The Crown could be made the subject of a defence in a claim for property by a traverse of office and be directly the subject of a claim in a *monstrans de droit*; these proceedings took place before Chancery.<sup>4</sup> These proceedings are obsolete, being replaced by petition of right, which still exists, now being regulated by Statute.<sup>5</sup> It lies to recover lands, chattels, or moneys which have come into the power of the Crown,<sup>6</sup> or compensation for non-restitution; to recover moneys payable under a Crown grant; and to recover sums due under, or damages for breach of, a contract with the Crown, including compensation for the occupation of land or premises under the Defence Act, 1842.<sup>7</sup>

The procedure is by petition, lodged with the Home Secretary on whose advice the King grants or withholds the *fiat*; the Attorney-General, of course, is consulted as to the advice to be given. There is no remedy for a refusal to advise a *fiat*,<sup>8</sup> but it is clear that there is a moral obligation on the adviser of the Crown not to advise refusal capriciously.<sup>9</sup> If the *fiat* is

<sup>1</sup> *Bellomont's Case* (1700), 2 Salk. 625.

<sup>2</sup> *Chandos (Marquis) v. Inland Revenue Commrs.* (1851), 6 Exch. 464.

<sup>3</sup> *Staunford's Prerog.* 42 b; *The Mogileff* (1921), 38 T.L.R. at p. 74.

<sup>4</sup> *Sir George Reynal's Case* (1612), 9 Co. Rep. 95 a.

<sup>5</sup> 23 & 24 Vict. c. 34. This does not abrogate any older procedure. For Northern Ireland see 36 & 37 Vict. c. 69 and S.R. & O. 1925, No. 1013.

<sup>6</sup> Detention of goods in the Customs is a valid ground: *Buckland v. R.*, [1933] 1 K.B. 767.

<sup>7</sup> *Bankers' Case* (1700), 14 St. Tr. at p. 39; *Thomas v. R.* (1874), L.R. 10 Q.B. 31; *Feather v. R.* (1865), 6 B. & S. 257; *Kildare County Council v. R.*, [1909] 2 I.R. 199, 232; *Att. Gen. v. De Keyser's Royal Hotel*, [1920] A.C. 508, 530, 545 (use of hotel for war purposes).

<sup>8</sup> *Irwin v. Grey* (1862), 3 F. & F. 635. See p. 21, above.

<sup>9</sup> *Ryves v. Duke of Wellington* (1846), 9 Beav. 579, 600; *Nathan, In re* (1884), 12 Q.B.D. at p. 479.

given, the petition is lodged with the Treasury Solicitor, and the Crown must either plead or demur. The proceedings follow lines similar to those of an ordinary action, but a petition is difficult to amend, as it would be impossible to deprive the Crown of its control of proceedings by refusal of a *fiat*,<sup>1</sup> and the Crown cannot be made to disclose documents if this would be contrary to public interests, while it is absolutely entitled to secure a full discovery from the suppliant.<sup>2</sup> If judgment is given for the suppliant the Treasury may pay from any funds legally available (i.e. appropriated by Parliament),<sup>3</sup> but execution is not possible. Costs can be awarded.

There is no alternative form of procedure. An action does not lie against any official on a contract made for the Crown,<sup>4</sup> or to compel an officer in control of funds to pay a subordinate.<sup>5</sup> *Mandamus* will not lie to compel payment,<sup>6</sup> nor is an action for a declaratory judgment available.<sup>7</sup>

Moreover, it is impossible by treating the Crown as a trustee for its subjects to recover sums obtained by it under treaties, securing payment of compensation for wrongs done to them or in respect of contracts, whether French compensation for confiscated property,<sup>8</sup> or sums paid for Chinese debts,<sup>9</sup> or damage done to civilians in war.<sup>10</sup> Nor can a Secretary of State be treated as a trustee charged with the distribution of bounty granted for war services.<sup>11</sup>

A further limitation of the liability of the Crown, and a vital one in practice, is the fact that no servant of the Crown, military, naval, air or civil, has any rights enforceable against the Crown in respect of a contract of service, e.g. as regards

<sup>1</sup> *Badman Bros. v. R.*, [1924] 1 K.B. 64.

<sup>2</sup> See p. 339 *post*.

<sup>3</sup> See p. 184, n. 2, *ante* for the rule that a governmental contract is concluded subject to the provision of funds by Parliament.

<sup>4</sup> *Macbeath v. Haldimand* (1786), 1 T.R. 172; *Gidley v. Lord Palmerston* (1822), 2 Brod. & B. 275; *Palmer v. Hutchinson* (1881), 6 App. Cas. 619; *Dunn v. Macdonald*, [1897] 1 Q.B. 555; *Dunn v. R.*, [1896] 1 Q.B. 116.

<sup>5</sup> *Grenville-Murray v. Clarendon (Earl)* (1869), L.R. 9 Eq. 11.

<sup>6</sup> *R. v. Lords Commrs. of Treasury* (1872), L.R. 7 Q.B. 387.

<sup>7</sup> *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K.B. 402; *Kynaston v. Att. Gen.* (1933), 49 T.L.R. 300. See p. 351 *post*.

<sup>8</sup> *Baron de Bode's Case* (1844), 8 Q.B. 208.

<sup>9</sup> *Rustomjee v. R.* (1876), 1 Q.B. D. 487.

<sup>10</sup> *Civilian War Claimants Association Ltd. v. R.*, [1932] A.C. 14.

<sup>11</sup> *Kinloch v. Secretary of State for India* (1882), 7 App. Cas. 619.

salary<sup>1</sup> or pension.<sup>2</sup> It is an essential character of all Crown Service that, apart from statutory provision, the Crown has an absolute right to dispense with any officer's services and that it lies with it to pay its servants at its pleasure. Moreover, it is impossible to evade this rule by bringing an action against the officer from whom the appointment is immediately derived, for, as the Crown cannot be sued in contract, its officer cannot be held liable for alleged breach of warranty of authority.<sup>3</sup>

(c) *Claims in Tort against the Crown*

The King can do no wrong, and thus no suit<sup>4</sup> lies against the Crown in tort, whether in respect of the King's own acts or those of his servants. But any officer who carries out tortious action is liable to the person aggrieved, and, if his action was performed in good faith for the public interest, in the event of damages being awarded against him, the amount may be defrayed as of grace from public funds. There is in a sense an advantage in this rule, in that the individual officer has a strong motive to avoid illegality, as he may have personally to bear the brunt of his wrongdoing. But it is objectionable in principle that the legal remedy should be only against a mere subordinate probably of no substance. The proposals<sup>5</sup> for allowing suit in tort and also in contract as of right, and for assimilating procedure in Crown cases to those in ordinary cases, which received the attention of a committee in 1927, have not so far been carried out in full, though certain concessions were made in an Act of 1933 as regards contracts, including the application to the Crown of the usual rules as to costs.<sup>6</sup>

<sup>1</sup> Cf. *Gibson v. East India Co.* (1839), 5 Bing. N.C. 262, 274; *Tufnell, In re* (1876), 3 Ch. D. 164; *Mitchell v. R.*, [1896] 1 Q.B. 121 n.; *Smith v. Lord Advocate* (1897), 35 Sc.L.R. 117; *Leaman v. R.*, [1920] 3 K.B. 663; *Mulvenna v. The Admiralty*, [1926] S.C. 842, 859: the servant's claim is on the bounty of the Crown.

<sup>2</sup> *Yorke v. R.*, [1915] 1 K.B. 852; *Cooper v. R.* (1880), 14 Ch. D. 111; *Considine v. McInerney*, [1916] 2 A.C. 162, 170; *Wigg v. Att. Gen. for Irish Free State*, [1927] A.C. 674; *Transferred Civil Servants (Ireland) Compensation, In re*, [1929] A.C. 242; *Nixon v. Att. Gen.*, [1931] A.C. 184.

<sup>3</sup> *Dunn v. Macdonald*, [1897] 1 Q.B. 555; *Kenny v. Cosgrave*, [1926] I.R. 517.

<sup>4</sup> *Canterbury (Viscount) v. Att. Gen.* (1843), 1 Ph. 306; *Tobin v. R.* (1864), 16 C.B., N.S., 310; *Feather v. R.* (1865), 6 B. & S. 257.

<sup>5</sup> *Parl. Pap.*, Cmd. 2842.

<sup>6</sup> 23 & 24 Geo. V, c. 36, s. 7.

The rule, therefore, is that an action lies<sup>1</sup> against the officer actually responsible for a tort. It does not lie against the head of a department,<sup>2</sup> unless he has personally so acted as to be directly responsible,<sup>3</sup> for an officer is not the employer of his subordinates, so as to be liable under the common law for their torts committed within the scope and in the course of their employment.<sup>4</sup> But the head is under obligation to give instructions to his subordinates, so he may be liable if he omits to do so and a subordinate errs.<sup>5</sup>

It is, of course, possible to impose liability to suit in contract and tort, but this is distinctly rare. The Secretary of State for India in Council is liable in civil proceedings as was the East India Co. The Board of Trade since 1876<sup>6</sup> has been liable to suit if its officers detain improperly a ship deemed unfit to proceed to sea. The Minister of Transport<sup>7</sup> may be sued in contract and tort and is responsible for the acts and defaults of the officers, servants, and agents of the ministry. But only for criminal liability is special provision made as to responsibility of servants of Governmental departments under the Road Traffic Act, 1930.<sup>8</sup> It is, of course, possible for officers so to act as to make themselves liable in contract.<sup>9</sup>

In the Dominions and Colonies it is not rare for the Crown to be sued direct, either by custom,<sup>10</sup> as to some extent in Scotland, or under special statute, not only in contract but

<sup>1</sup> *Money v. Leach* (1765), 3 Burr. 1742; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P.C. 209, 236; *Walker v. Baird*, [1892] A.C. 491; *Johnstone v. Pedlar*, [1921] 2 A.C. 262; *Raleigh v. Goschen*, [1898] 1 Ch. 73.

<sup>2</sup> *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178; *Roper v. Public Works Comrs.*, [1915] 1 K.B. 45; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; *Rowland v. Air Council* (1927), 96 L.J. Ch. 470.

<sup>3</sup> *Lane v. Cotton* (1701), 1 Ld. Raym. 646; *Macgregor v. Lord Advocate*, [1921] S.C. 847.

<sup>4</sup> *Lane v. Cotton*, u.s.; *Rowning v. Goodchild* (1773), 3 Wils. 443; *Whitfeld v. Ld. Despencer* (1778), 2 Cowp. 754; *Raleigh v. Goschen*, u.s.; *Bainbridge v. Postmaster-General*, u.s.

<sup>5</sup> *Mee v. Cruikshank* (1902), 86 L.T. 708.

<sup>6</sup> See now 57 & 58 Vict. c. 60, s. 459; *Thomson v. Farrer* (1882), 9 Q.B. D. 372. <sup>7</sup> 9 & 10 Geo. V, c. 50, s. 26. <sup>8</sup> s. 121.

<sup>9</sup> *Graham v. Public Works Comrs.*, [1901] 2 K.B. 781, but the case is of doubtful value.

<sup>10</sup> e.g. *Ceylon, Hettihewage Siman Appu v. Queen's Advocate* (1884), 9 App. Cas. 571. For Scotland see *Macgregor v. Lord Advocate*, [1921] S.C. 847, and 20 & 21 Vict. c. 44.

also in tort.<sup>1</sup> When no provision is made and English law is the common law, a *fiat* to a petition of right could be granted by the king for trial in the local court. But a petition lies in England only in respect of claims against the Crown arising out of its action in its capacity in respect of English Government, and, on the transfer of power to the Irish Free State, any remedy must be sought from that Government.<sup>2</sup> In a number of cases, after the conclusion of the War of 1914-18, petitions of right were destroyed in respect of various matters arising out of the War by the Indemnity Act, 1920.<sup>3</sup>

Mere incorporation of a department for certain purposes of suit in no wise implies the creation of liability to be sued in contract or tort.<sup>4</sup> The position of the Secretary of State for India in Council is abnormal; he inherits the liability of the East India Company to suit in contract and tort, in all matters which are regarded as appertaining to the functions of the Company as a commercial body, as opposed to a body exercising sovereign powers. Governmental liability will be maintained, though changed in form, under the future form of constitution.<sup>5</sup>

### § 3. THE CROWN'S PRIVILEGES IN LITIGATION

It rests with the Crown to decide at its discretion whether documents under its control shall be made available for legal proceedings. Thus correspondence received by the Colonial Secretary cannot be required to be produced,<sup>6</sup> nor correspondence between the Court of Directors of the East India Company and the Commissioners for the Affairs of India,<sup>7</sup>

<sup>1</sup> e.g. in New South Wales, *Farnell v. Bowman* (1887), 12 App. Cas. 643; in Australia generally *Commonwealth v. N.S. Wales* (1923), 32 C.L.R. 200; *Robinson v. South Australia (State)*, [1931] A.C. 704; in the Straits, *Att. Gen. of Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192; in the Union of South Africa, Crown Liabilities Act, 1910; *Lawrie v. Union Government*, [1930] T.P.D. 402; in Canada, Exchequer Court Act (R.S.C. 1927, c. 34); *Capon v. R.*, [1933] Ex. C.R. 54.

<sup>2</sup> *Att. Gen. v. Great Southern and Western Ry. of Ireland*, [1925] A.C. 754.

<sup>3</sup> *Brocklebank Ltd. v. R.*, [1925] 1 K.B. 52; *Marshall Shipping Co. v. R.* (1925), 41 T.L.R. 285; *Moss Steamship Co. v. Board of Trade*, [1923] 1 K.B. 447; cf. *Att. Gen. v. Wilts United Dairies* (1921), 37 T.L.R. 884.

<sup>4</sup> Cf. *Gilleghan v. Minister of Health* (1931), 47 T.L.R. 439; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517.

<sup>5</sup> Cf. *Parl. Pap.*, Cmd. 4268.

<sup>6</sup> *Anderson v. Hamilton* (1816), 8 Price 244 n.

<sup>7</sup> *Smith v. East India Co.* (1841), 1 Ph. 50.



nor a report by the Chief Cashier of the Inland Revenue on a subordinate;<sup>1</sup> so a firm cannot be made or even permitted to disclose letters to their agents in Persia containing confidential information from the Admiralty,<sup>2</sup> if the information cannot be disclosed without injury to the public interests. It is for the head of the department to claim privilege, though it is not essential that he should appear in person in Court, and a letter from the Minister of Transport has been accepted.<sup>3</sup> But privilege must not be claimed vaguely for a type of documents as such, and the Court can in the absence of a proper ground of claim examine the documents, and decide if public interests would suffer from disclosure.<sup>4</sup>

The service of the Crown is also protected by the rule that a Civil Servant cannot be sued for libel or slander in respect of communications made on official matters to another Crown servant.<sup>5</sup> This is also the case in respect of reports of Official Receivers in Bankruptcy.<sup>6</sup> Moreover, servants of the Crown cannot be required to give evidence if that will be prejudicial to the public interest, whether the witness be the Lord Chamberlain,<sup>7</sup> an Inspector of the Board of Trade,<sup>8</sup> or a Secretary of State,<sup>9</sup> who has statutory exemption in matters under the Foreign Enlistment Act of 1870.<sup>10</sup>

A further protection for Crown Servants<sup>11</sup> arises from the Public Authorities Protection Act, 1893, which requires that

<sup>1</sup> *Hughes v. Vargas* (1893), 9 T.L.R. 551.

<sup>2</sup> *Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd.*, [1916] 1 K.B. 822.

<sup>3</sup> *Beatson v. Skene* (1860), 5 H. & N. 838; *Williams v. Star Newspaper Co. Ltd.* (1908), 24 T.L.R. 297; *Hennessey v. Wright* (1888), 21 Q.B.D. 509; *Att. Gen. v. Nottingham Corp.*, [1904] 1 Ch. 673; *Ankin v. L.N.E.R. Co.*, [1930] 1 K.B. 527; *Carmichael v. Scottish Co-operative Wholesale Soc., Ltd.*, [1934] Sc. L.T. 138. Cf. *Keith, Jour. Comp. Leg.* xvi, 296-8.

<sup>4</sup> *Spigelmann v. Hocker* (1933), 50 T.L.R. 87; cf. *Robinson v. State of South Australia* (No. 2), [1931] A.C. 704.

<sup>5</sup> *Chatterton v. Secretary of State for India*, [1895] 2 Q.B. 189; *Burr v. Smith*, [1909] 2 K.B. 306; *M. Isaacs & Sons v. Cook*, [1925] 2 K.B. 391.

<sup>6</sup> *Bottomley v. Brougham*, [1908] 1 K.B. 584.

<sup>7</sup> *West v. West* (1911), 27 T.L.R. 476.

<sup>8</sup> *Gibson v. Caledonian Ry. Co.* (1896), 33 Sc. L.R. 638; cf. *Att. Gen. v. Nottingham Corp.*, [1904] 1 Ch. 673.

<sup>9</sup> *Irwin v. Grey* (1862), 3 F. & F. 635.

<sup>10</sup> 33 & 34 Vict. c. 90, s. 29. The Director of Public Prosecutions normally need not disclose the source of the information on which he acts; *Marks v. Beyfus* (1890), 25 Q.B.D. 494.

<sup>11</sup> *The Danube*, [1921] P. 183; cf. *Newall v. Starkie* (1920), 89 L.J. P.C. 1.

suit in respect of any official act or any neglect or default in the execution of any statutory or public duty must be brought within six months of the act, neglect, or default, or in case of a continuing injury, within six months of its cessation. The officer affected must be allowed to tender amends; if an action is commenced after tender or after payment into court the plaintiff cannot recover costs after the tender or payment if the award in his favour is not more than the tender or payment. Moreover, the official if successful can be awarded costs as between solicitor and client. The Act in operation sometimes functions unjustly, as regards the time limit,<sup>1</sup> which, however, is not applicable to *certiorari* proceedings,<sup>2</sup> or a prosecution alleged to be malicious.<sup>3</sup>

## VII. THE JUDICIAL FUNCTIONS OF THE EXECUTIVE AND ADMINISTRATIVE BODIES

It is an essential characteristic of the present constitution that, in addition to the wide delegation of legislative power to the executive, there has been a progressive delegation of judicial and quasi-judicial functions to the officers of the Crown. This delegation is often made in connexion with delegation of legislative authority, and it has evoked serious disapproval,<sup>4</sup> as involving the execution and interpretation of a regulation by its framers in derogation of the valuable principle that executive action under Acts of Parliament should be subject to judicial control. On the other hand, it is clear that under the complex conditions of the modern state, with its far-extending activity in the economic and social sphere, the ordinary courts are not able to deal rapidly and with adequate knowledge with a mass of technical detail. It is claimed by defenders of executive judicatures that the system is (1) far cheaper and more expeditious in operation than the ordinary Court procedure; (2) that the issues dealt with (unemployment insurance claims, pension claims, education disputes, health matters) need expert handling, which is far better

<sup>1</sup> On the obscurity of the provision see *Harnett v. Fisher*, [1927] A.C. 574.

<sup>2</sup> *R. v. London County Council*; *Swan & Edgar, Ex parte* (1929), 45 T.L.R. 512.

<sup>3</sup> *Harten v. London County Council* (1929), 45 T.L.R. 318.

<sup>4</sup> See, e.g., Lord Hewart, *The New Despotism* (1928); C. K. Allen, *Bureaucracy Triumphant* (1931).

provided by erecting an expert tribunal than by adducing expert evidence, or even by appointing expert assessors as is done in maritime causes; (3) that it is only thus possible for a progressive policy of interpretation of regulations to be carried out on a consistent basis. There is, it is argued, a vital difference between the legal interpretation of issues arising between subjects affecting private interests and the interpretation in a broad and progressive spirit of governmental regulations aimed at promoting social and economic progress, and judges are not by training and mental outlook well qualified for the latter function. They tend inevitably to conserve private rights and liberties from control, while regulations by government authorities should be interpreted in the spirit of promoting public advantage rather than conserving individual interests. Thus a Milk Marketing Board can be authorized to penalize producers or consumers for disregard of its enactments under its delegated powers, in lieu of the cumbrous procedure of application for penalties to a court which might well find reasons for refusing compliance in the absence of strict legal proof.<sup>1</sup>

There is no simple solution of the difficulties of the situation, and the issue depends to some extent on the nature of the decision. A clear distinction must be drawn between judicial and quasi-judicial decisions. A true judicial decision presupposes a dispute between two or more parties and involves four requisites: (1) The presentation of the case by the parties; (2) if facts are at question, their ascertainment by evidence adduced by the parties and by arguments; (3) if there is a question of law, the submission of argument; and (4) a decision which disposes of the whole matter by a finding on the facts and the application of the law to the facts so found, including, where required, a ruling on any disputed question of law. A quasi-judicial decision involves points (1) and (2), not necessarily (3), and never (4), the place of which is taken by administrative action, the character of which is determined by the minister's free choice. Thus under the

<sup>1</sup> For intervention by the Courts see *R. v. Milk Marketing Board; North, Ex parte* (1934), 50 T.L.R. 559; *Wenham, Ex parte* (1934), 78 S.J. 414. In Scotland a very wide view of the Scottish Board's powers was taken by the Courts in 1934-5.

Road Traffic Act, 1930, the Minister of Transport is directed to consider the report of a person appointed to hold a public inquiry, and has the responsibility of deciding the facts involved and considering the arguments of the parties;<sup>1</sup> he then takes such administrative action as in his discretion he thinks fit, while a judge is bound to decide according to law.

Ministers, of course, may have purely judicial as well as quasi-judicial functions; a purely judicial function is the determination of the character of employment as insurable or not under the Unemployment Insurance Acts. In both cases, according to the Report of the Committee on Ministers' Powers, certain principles of natural justice apply, though natural justice is not a technical category<sup>2</sup> of substantive law, but belongs to the field of moral and social principles. These include (1) the rule that no man may be a judge in his own cause;<sup>3</sup> even the Lord Chancellor's approval of a judgment of the Vice-Chancellor granting relief to a company in which he is interested cannot stand,<sup>4</sup> and justices may have decisions based on the interests of the ratepayers upset if they can be suspected of bias.<sup>5</sup> A minister, therefore, may be biased in favour of his own policy, though no case exists at present of judicial functions proper being so endangered. But in quasi-judicial functions such bias is more probable. (2) No person should be condemned unheard, and he must therefore know in good time the case which he has to meet. But he need have no oral hearing.<sup>6</sup> Those two principles are rules of law which the Courts will enforce, the following are rather moral doctrines. (3) The decision should be communicated along with the reasons to the party affected. A more doubtful principle is (4) the right of the parties to have communicated to them the report of any Inspector who holds a public inquiry.

<sup>1</sup> *R. v. Minister of Transport; Southend Carriers, Ex parte, The Times*, 18 Dec. 1931.

<sup>2</sup> *Schibbsby v. Westenholz* (1870), L.R. 6 Q.B. 155; commenting on *Buchanan v. Rucker* (1807), 1 Camp. 66; (1808), 9 East 192.

<sup>3</sup> *R. v. Rand* (1866), L.R. 1 Q.B. 230; *Wingrove v. Morgan*, [1934] Ch. 423, 431.

<sup>4</sup> *Dimes v. Grand Junction Canal (Proprietors)* (1852), 3 H.L.C. 759.

<sup>5</sup> *R. v. Sunderland Justices*, [1901] 2 K.B. 357.

<sup>6</sup> *Local Government Board v. Arlidge*, [1915] A.C. 120; cf. *Board of Education v. Rice*, [1911] A.C. 179; *Errington v. Minister of Health* (1934), 51 T.L.R. 44.

These characteristics distinguish judicial and quasi-judicial decisions from mere administrative decisions, in taking which the ministry need not weigh submission of arguments nor collate any evidence, such as the decision of the Admiralty to place a contract for stores or of the Home Secretary to grant naturalization to an alien. But many administrative decisions depend on a quasi-judicial procedure; thus the justices in licensing matters have a discretion to grant licences, but they must act judicially, consider evidence, hear arguments on facts and perhaps law, and exclude all irrelevant and improper considerations.<sup>1</sup> A like rule applies to the Road Commissioners under the Road Traffic Act, 1930, and to the minister on appeal.<sup>2</sup>

(a) *Specialized Courts of Law*

There are certain cases in which tribunals effectively judicial have been set up to deal with issues of a special type requiring expert knowledge. Down to 1873 the duty of considering issues affecting railways lay with the Court of Common Pleas, but thereafter a new Court was set up of three Commissioners, one with legal, one with business experience; it was remodelled in 1888 and given a wider jurisdiction as the Railway and Canal Commission. A judge presides, chosen by the Lord Chancellor; the two commissioners are chosen by the Minister of Transport.<sup>3</sup> It has powers to deal with issues of facilities and mutual arrangements between companies, and can also dispose of issues affecting working facilities and support in mines and mining amalgamations.<sup>4</sup> On law an appeal lies to the Court of Appeal.

Jurisdiction as to rates and charges was transferred under the Railways Act, 1921, to the Railway Rates Tribunal composed of a president, who must be a lawyer, and two members, selected by the Lord Chancellor, the President of the Board of Trade, and the Minister of Transport.<sup>5</sup> Appeal lies to the Court of Appeal on a point of law.

<sup>1</sup> *Sharp v. Wakefield*, [1891] A.C. 173, 178-82; cf. 10 Ed. VII and 1 Geo. V, c. 24, s. 10; 11 & 12 Geo. V, c. 42, s. 11.

<sup>2</sup> 20 & 21 Geo. V, c. 43.

<sup>3</sup> 36 & 37 Vict. c. 48; 51 & 52 Vict. c. 25; 9 & 10 Geo. V, c. 50.

<sup>4</sup> 13 & 14 Geo. V, c. 20; 16 & 17 Geo. V, c. 28.

<sup>5</sup> Additional functions are conferred on the tribunal, as specially rein-

The Registrar of Friendly Societies has a wide jurisdiction over disputes in issues under the Friendly Societies Act, 1896, can investigate the affairs of societies and dissolve them, has jurisdiction under the Trade Union Acts, 1913 and 1927, as to political fund levies, and, as Industrial Assurance Commissioner, under the Industrial Assurance Act, 1923.

The Special Commissioners of Income Tax, though composed of Crown servants, decide on appeal issues of income tax, and can be required to state a case for the opinion of the High Court; they stand high in public confidence. Another Court which hears applications and appeals in income-tax issues is the Board of Referees; it is composed of business and professional men, appointed by the Treasury.

### *(b) Ministerial Tribunals*

In other cases the court is less formally constituted, and its procedure is less legally controlled. The procedure is well illustrated by the case of claims for unemployment insurance benefit, which are first submitted to an insurance officer appointed by the Minister of Labour; if not allowed they go before a Court of Referees, composed of equal numbers of representatives of employers and contributors under a Chairman appointed by the Minister. The final decision rests with an umpire appointed by the Crown.<sup>1</sup> In cases of applications for public assistance under Part II of the Unemployment Act, 1934,<sup>2</sup> appeal lies from an officer of the Unemployment Assistance Board to an Appeal Tribunal of three members; the chairman is appointed by the Minister, and one of the two members is chosen by the Board to represent it, while the other is selected by the Board from a panel nominated by the Minister to represent workpeople. There is in the case of war pensions a Pensions Appeal Tribunal appointed by the Lord Chancellor,<sup>3</sup> with final powers of decision. Under the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, the decision of the Minister of Health is subject to appeal to a referee or referees selected from a panel of barristers and solicitors forced by two members, under the London Passenger Transport Act, 1933, s. 36 and sch. ix. No appeal then lies.

<sup>1</sup> 10 & 11 Geo. V, c. 30; 20 & 21 Geo. V, c. 16.

<sup>2</sup> 24 & 25 Geo. V, c. 29, ss. 36, 39, 57; Sched. VII.

<sup>3</sup> 11 & 12 Geo. V, c. 49.

appointed by the National Health Insurance Joint Committee, the referee may be required to state a case by the High Court or may do so at his discretion.<sup>1</sup> Under the Gas Regulation Act, 1920, a Chief Gas Examiner, appointed by the Board of Trade, acts as a Court of Appeal from prescriptions laid down by Gas Referees as to tests by Gas Examiners. From the licensing authorities of vehicles appeal lies to an Appeal Tribunal, appointed by the Minister of Transport, after consultation with the Lord Chancellor, Board of Trade, and Secretary of State for Scotland.<sup>2</sup>

### (c) Ministerial Decisions

In only a few cases are ministers personally charged with judicial decisions. Thus the Minister of Health decides issues under the Public Health Act, 1875, as to the claim of a local authority to recover expenses in respect of sanitary measures from a private person; in doing so he has a wide discretion to weigh all relevant issues.<sup>3</sup> In exceptional cases the Minister of Agriculture and Fisheries decides the amount of compensation for the extinction of manorial rights.<sup>4</sup> The Minister of Health decides on legal advice, subject to appeal to the High Court, the issue of insurable employment. The Board of Education must determine judicially the claim of the managers of a voluntary school that the local authority must maintain and keep it efficient; if the Board fails to do so, *mandamus* lies.<sup>5</sup>

Quasi-judicial decisions are not rare. The Minister of Health must decide any issue between the County Medical Officer of Health and a District Officer, as to the sufficiency of the information supplied to the former.<sup>6</sup> The Board of Education must decide if a school is necessary or not, having regard to the interests of secular education, the wishes of parents, and economy of rates. A further inquiry is possible

<sup>1</sup> *Kerr v. Dept. of Health for Scotland*, [1930] S.C. 813.

<sup>2</sup> 23 & 24 Geo. V, c. 53, s. 15.

<sup>3</sup> *R. v. Local Government Board* (1882), 10 Q.B. D. 309.

<sup>4</sup> 12 & 13 Geo. V, c. 38.

<sup>5</sup> *Board of Education v. Rice*, [1911] A.C. 179.

<sup>6</sup> 9 Ed. VII, c. 44, s. 69 (2) and (3), re-enacted by 23 & 24 Geo. V, c. 51, s. 113.

and the report must be sent to any local authority; the decision, however, rests with the Board.<sup>1</sup> Under the Housing Act, 1925,<sup>2</sup> the Minister of Health might confirm schemes for which a local authority petitioned; he had a local inquiry held, and decided to confirm or not on full consideration; an order so made was to have effect as if enacted in the Act. Under the Housing Act, 1930, the minister must decide whether or not to confirm a clearance order; the Minister of Transport must determine whether to modify the restrictions on the use of a road by public-service vehicles.<sup>3</sup>

In many cases, the minister acts on the base of an Inspector's report after a public inquiry, but the Inspector does not decide. The House of Lords has ruled that it is not necessary that the Inspector's report should be disclosed, in a case which arose on the refusal of a Borough Council to determine a closing order in respect of a house in a borough.<sup>4</sup> The Committee on Ministers' Powers favoured publication as a rule; in any case they held that the reasons of decision should be communicated to the parties, and published where of general interest.

Generally the Committee stressed the value of open procedure, and the necessity of an appeal to the High Court on law, but not on fact, from the judicial decision of a minister or ministerial tribunal. They expressed approval of the type of specialized tribunal set up under the Import Duties Act, 1932, a single referee appointed by the Lord Chancellor who may not be a Governmental officer, to decide without appeal, any issue of the value of imported goods.<sup>5</sup> The Committee insisted on the principles that the High Court must always retain the power to see that Administrative Tribunals do not exceed their powers and that the principles of natural justice are maintained, a rule which involves the exclusion of the minister from exercising the right of decision on judicial issues in which he has an official interest, the right of parties to present (not necessarily orally) their cases, and the render-

<sup>1</sup> 11 & 12 Geo. V, c. 51, s. 19.

<sup>2</sup> *Minister of Health v. R.; Yaffé, Ex parte*, [1931] A.C. 494.

<sup>3</sup> 20 & 21 Geo. V, c. 43, s. 91.

<sup>4</sup> *Local Government Board v. Arlidge*, [1915] A.C. 120.

<sup>5</sup> See 22 Geo. V, c. 8; 22 Geo. V, c. 1; 22 Geo. V, c. 3; so 11 & 12 Geo. V, c. 47.



ing of reasoned decisions. They suggested also that the proceedings of ministerial tribunals should be exempt from risk of libel and slander proceedings, a point now doubtful.<sup>1</sup> But they saw no essential objection to the rule that judicial decisions should be ascribed to tribunals of ministerial character in those rare cases where ordinary tribunals are insufficient, and that quasi-judicial decisions should be ascribed to ministers personally.

(d) *Professional Tribunals*

A special type of tribunal exists in a few cases of control of professional conduct. Barristers fall under the control of the Benchers of the Inns of Court to which they belong. The case of solicitors is provided for by the Solicitors Act, 1919,<sup>2</sup> under which a Disciplinary Committee may strike a solicitor off the rolls, but subject to appeal to the High Court. The Central Midwives Board controls midwives, subject to a like appeal under the Midwives Act, 1902. The General Medical Council has power<sup>3</sup> to strike from the Medical Register the name of any medical practitioner judged by the Council after due inquiry to have been guilty of infamous conduct in any professional respect. No appeal lies in such cases, though erasure of a name involves inability to sign a death certificate or sue for fees, and the tribunal is necessarily rather narrowly biased by professional tradition. Nor can a practitioner evade control by withdrawal of his name voluntarily.<sup>4</sup>

On the other hand, impartiality is secured in technical issues by appointment of legal experts, as in the case of appeals against Inland Revenue valuations, which are dealt with by referees appointed by the Lord Chief Justice, the Master of the Rolls, and the President of the Surveyors' Institution. The same authorities appoint a panel of official

<sup>1</sup> See as to a Court of Referees on unemployment insurance *Collins v. Henry Whiteway & Co.*, [1927] 2 K.B. 378.

<sup>2</sup> Consolidated in 22 & 23 Geo. V, c. 37. No appeal lies if the Committee refuses to find misconduct and makes no order; *Solicitor, In re* (1934), 78 S.J. 586.

<sup>3</sup> Medical Act, 1858, s. 29.

<sup>4</sup> *R. v. General Medical Board; Kynaston, Ex parte*, [1930] 1 K.B. 562.

arbitrators, one of whom decides issues of compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919.

#### VIII. CONTROL OF THE EXECUTIVE BY THE COURTS

While the interpretation of the law and its application to concrete cases, involving incidentally some virtual creation of new law, is the most usual function of the Courts, they are constantly called upon, as part of their work, to control the acts of the executive government and its officers and to maintain local governmental institutions and officers in due subordination to law. There are in the nature of things very narrow limits to such action, for the courts have no claim to substitute their judgment for that of the legislature, or the executive when that has been accorded a discretionary authority. But they can insist that the executive shall act according to law,<sup>1</sup> and in doing so they have the aid of the Writs used to control inferior jurisdiction.

The prerogative writs available for the purpose include that of *certiorari*. That writ provides for the bringing before the court of King's Bench of the record of the findings of an inferior court, so that full justice may be done. It is in this way that criminal proceedings may be removed to the High Court if necessary when it is not desirable to have a trial in a certain locality. But the writ has been directed to other uses, and it was properly employed to bring before the Court the question of the validity of an order of the Minister of Health under the Housing Act, 1925, approving an improvement or reconstruction scheme. If the scheme as approved did not conform with the Act, then it could be quashed by the Court, though the Act provided that the Order when made 'shall have effect as if enacted in the Act'.<sup>2</sup> It was not, however, sufficient to invalidate the Order of the minister that the scheme as submitted was invalid, if the minister so altered it as to render it in conformity with the Act. The writ is only applicable where there is a duty on the person or body concerned to decide.<sup>3</sup> Normally it is not possible for the

<sup>1</sup> *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. at p. 759.

<sup>2</sup> *Minister of Health v. R.*; *Yaffé, Ex parte*, [1931] A.C. 494.

<sup>3</sup> *R. v. Woodhouse*, [1906] 2 K.B. 501; cf. *Local Government Board v. Arlidge*, [1915] A.C. 120.

Court to deal with issues of fact, but wider power exists under certain Acts,<sup>1</sup> and the Court can review the decision of the local government auditor as to facts and law.<sup>2</sup> The writ does not lie to a purely extra-legal body,<sup>3</sup> such as a court acting under martial law. It is appropriate for control of the proceedings of licensing justices.<sup>4</sup>

*Prohibition* is also available; originally it was used to prevent inferior courts exceeding their jurisdiction, but it can freely be employed to forbid action by executive bodies if their act will be contrary to law. Thus it may be invoked against the Minister of Transport to prevent him making certain regulations under the London Traffic Act, 1924,<sup>5</sup> or against the Electricity Commissioners to preclude action not within their authority,<sup>6</sup> or against the Commissioners of Income Tax.<sup>7</sup> It is not available against a court under martial law because that is not a regular tribunal,<sup>8</sup> nor does it, nor *certiorari*, lie against the Church of England Assembly or its Legislative Committee.<sup>9</sup> It does lie against an assessment committee to prevent it proceeding to determine an assessment when improperly constituted.<sup>10</sup> But it is dubious if it really was available to prevent the Minister of Health considering an improvement scheme, as formerly held,<sup>11</sup> for it was in his power to alter the scheme to accord with an Act.<sup>12</sup>

*Mandamus* lies also not merely to inferior courts to state a case or to exercise a jurisdiction, but can be employed to compel public bodies or servants to perform a duty owed to an individual as opposed to one due to the Crown. But it does

<sup>1</sup> e.g. Highway Act, 1835, ss. 53, 54; *R. v. Bradford*, [1908] 1 K.B. 365; Public Health Act, 1875, s. 247; *R. v. Roberts*, [1908] 1 K.B. 407.

<sup>2</sup> *R. v. Roberts, u.s.*

<sup>3</sup> *Clifford and O'Sullivan, In re*, [1921] 2 A.C. 570; *R. v. Maguire*, [1923] 2 I.R. 58. <sup>4</sup> *R. v. Richmond Licensing Authority*, [1921] 1 K.B. 248.

<sup>5</sup> *R. v. Minister of Transport; Skylark Motor Coach Co., Ex parte* (1931), 47 T.L.R. 325. <sup>6</sup> *R. v. Electricity Commrs.*, [1924] 1 K.B. 171, 204.

<sup>7</sup> *Kensington Income Tax Commrs. v. Aramayo*, [1916] 1 A.C. 215.

<sup>8</sup> *Clifford and O'Sullivan, In re*, [1921] 2 A.C. 570.

<sup>9</sup> *R. v. Church Assembly Legislative Committee; Haynes-Smith, Ex parte*, [1928] 1 K.B. 411.

<sup>10</sup> *R. v. North Worcestershire Assessment Comm.; Hadley, Ex parte*, [1929] 2 K.B. 397.

<sup>11</sup> *R. v. Minister of Health; Davis, Ex parte*, [1929] 1 K.B. 619.

<sup>12</sup> *Yaffé, Ex parte*, [1931] A.C. 494. Under the Housing Act, 1930, s. 11, a simpler procedure is provided; *Errington v. Minister of Health* (1934), 51 T.L.R. 44.

not lie to such direct representatives of the Crown as the Lords Commissioners of the Treasury,<sup>1</sup> though it is available against the Commissioners of Income Tax.<sup>2</sup> It is not available against a Secretary of State to compel him to determine sums claimed to be under a royal warrant.<sup>3</sup> Nor can property be thus recovered from servants of the Crown, nor the return of overpaid probate duty.<sup>4</sup> Apparently it does not lie to an Archbishop to compel him to hear objections to the formal confirmation of a bishop.<sup>5</sup> Nor in any case does it lie if another sufficient and convenient remedy is properly available, as for instance in the case of the Charity Commissioners or the Registrar of Joint Stock Companies.<sup>6</sup> It is freely available against local authorities.<sup>7</sup>

In the case of all these writs the formal procedure is by the issue of a rule *nisi* which may be made absolute or discharged. In 1933 provision for simplification of the procedure was made, and in lieu of procedure by application for an order *nisi*, it is to be as a rule requisite to obtain leave for the application for an order absolute.<sup>8</sup> Proceedings akin to *mandamus* are also authorized in the case of justices, and judges or officers of a County Court.

In place of the old writ *quo warranto* proceedings by information in the nature of a *quo warranto* lie to question the validity of the exercise of an office or function by any person, or of a franchise by a corporation; formerly it was used freely to destroy corporations, as in the case of London in 1683-5.<sup>9</sup> The procedure originally was for the advantage of the Crown, but later it became available for the use of any private person aggrieved by the usurpation.<sup>10</sup>

<sup>1</sup> *R. v. Lords Commrs. of Treasury* (1872), L.R. 7 Q.B. 387.

<sup>2</sup> *R. v. Commrs. of Inland Revenue*, [1891] 1 Q.B. 488.

<sup>3</sup> *R. v. Secretary of State for War*, [1891] 2 Q.B. 326. Contrast *Board of Education v. Rice*, [1911] A.C. 179: *mandamus* or *certiorari* lies.

<sup>4</sup> *R. v. Commrs. of Customs* (1836), 5 A. & E. 380; *Nathan, In re* (1884), 12 Q.B.D. 461.

<sup>5</sup> *R. v. Archbishop of Canterbury*, [1902] 2 K.B. 503.

<sup>6</sup> *R. v. Charity Commrs.*, [1897] 1 Q.B. 407; *R. v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131; cf. *R. v. Christ's Hospital*, [1917] 1 K.B.

24. See also *Stepney Borough Council v. Walker & Sons*, [1934] A.C. 365.

<sup>7</sup> e.g. *R. v. Bedwellty U.D.C.*; *Price, Ex parte*, [1933] 1 K.B. 333.

<sup>8</sup> 23 & 24 Geo. V, c. 30, s. 5; cf. *R. v. Boteler* (1864), 4 B. & S. 959.

<sup>9</sup> 8 St. Tr. 1039.

<sup>10</sup> *Darley v. R.* (1845-6), 12 Cl. & F. at p. 545; *R. v. Speyer*, [1916] 1 K.B. 595, 609.

An *Injunction* again will be issued to prevent the misuse of any body of powers given by statutory authority, e.g. to take<sup>1</sup> land for public purposes, or to carry on operations which may constitute a public nuisance.<sup>2</sup> Occasionally it has been granted against government departments, e.g. to restrain the Treasury<sup>3</sup> from paying away compensation money in their hands. But it is clear that an injunction lies only against an official as an individual<sup>4</sup> and not as holder of a post, and that it must be brought against the official legally responsible for the act threatened and not a mere subordinate.<sup>5</sup>

It is possible also for the Courts to issue judgments declaratory of the rights of subjects in face of possible Crown claims. This is established in *Dyson v. Att. Gen.*, which arose out of the demand of the Inland Revenue for returns under the land taxation clauses of the Finance (1909-10) Act, 1910.<sup>6</sup> But the extent of this power is very limited, and it cannot be used to obtain a declaration in favour of any claim of a subject which ought to be pursued by petition of right.<sup>7</sup> But a declaration may be made against an officer as an individual negating his right to do unauthorized acts.<sup>8</sup> The essence, therefore, of this procedure is negative; it can avert illegal action, not redress it.

<sup>1</sup> *Galloway v. Mayor and Commonalty of London* (1866), L.R. 1 H.L. at p. 43.

<sup>2</sup> *Hammersmith Ry. Co. v. Brand* (1869), L.R. 4 H.L. 171; *Metr. Asylum District Managers v. Hill* (1881), 6 App. Cas. at p. 211.

<sup>3</sup> *Ellis v. Grey* (1833), 6 Sim. 214; cf. *Rankin v. Huskisson* (1830), 4 Sim. 13 (Commrs. of Woods).

<sup>4</sup> *Hutton v. Secretary of State for War* (1926), 43 T.L.R. 106, explaining *Nireaha Timaki v. Baker*, [1901] 1 A.C. 561.

<sup>5</sup> *Hawley v. Steele* (1877), 46 L. J. Ch. 782.

<sup>6</sup> [1911] 1 K.B. 410; [1912] 1 Ch. 158; *Burghes v. Att. Gen.*, *ibid.* 173; cf. *Hodge v. Att. Gen.* (1839), 3 Y. & C. Ex. 342.

<sup>7</sup> *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K.B. 402, 408. Cf. p. 325 above.

<sup>8</sup> *China Mutual Steam Navigation Co. v. Maclay*, [1918] 1 K.B. 33.

## APPENDIX

### § 1. LETTERS PATENT CONSTITUTING THE COMMISSION OF THE TREASURY<sup>1</sup>

GEORGE the Fifth, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith. To Our right trusty and well-beloved Counsellors A. B. and C. D., and Our trusty and well-beloved E. F., G. H., I. J., K. L., and M. N., greeting. Whereas We did, by Our Letters Patent, under the Great Seal of Our Realm, bearing date at Westminster the     day of     in the     year of Our Reign, constitute and appoint the persons therein named to be Commissioners of Our Treasury of Our United Kingdom as therein mentioned. Now know ye that We do by these presents revoke and determine the said Letters Patent. And further know ye that We, trusting in your wisdom and fidelity, of Our special grace, do constitute and appoint you to be Commissioners<sup>2</sup> of Our Treasury of Our United Kingdom, and to do and perform all things whatsoever which might have heretofore been done and performed by the late Commissioners of Our Treasury of Our United Kingdom. And to that end and purpose We do, by these presents, give and grant unto you, Our said Commissioners, or any two or more of you, full power and authority, immediately from henceforth, from time to time during the vacancy of the office of Lord High Treasurer of Our United Kingdom, to confirm and approve of all those Orders and Warrants which have been already signed by the late Commissioners of Our Treasury of Our United Kingdom, and which are remaining unexecuted, and which unto you shall seem reasonable and for Our service, and to cause the same to be duly executed; and also to perform and execute all acts and things whatsoever which heretofore might or ought to have been performed by the late Commissioners of Our Treasury of Our United

<sup>1</sup> The form of these Letters has undergone no change since Queen Victoria's reign, except so far as is rendered necessary by the changes as to Ireland.

<sup>2</sup> The number of Lords Commissioners was limited by 6 Anne, c. 41, s. 26 to the number then existing. The Treasury Commission then consisted of a First Lord, the Chancellor of the Exchequer, and three junior Lords. By 56 Geo. III, c. 98, the Treasuries of Great Britain and Ireland were amalgamated, and power was given (s. 14) to increase the number of Commissioners by two. This power has been partially exercised since Dec. 1905: in Sir Henry Campbell-Bannerman's government there were four junior Lords, and the number since has varied; in 1934-5 there were five, two unpaid.

Kingdom in as ample manner and as fully and effectually to all intents and purposes as such Commissioners heretofore have done or might have done by virtue of any power or authority to them belonging, or of any Act of Parliament, law, usage, or custom. And We do hereby require and authorize Our High Chancellor of Great Britain, or Our Keeper of the Great Seal of Our Realm, or Our Commissioners for the Custody of the Great Seal of Our Realm and all other Officers and persons whatsoever for the time being whom these presents shall or may in anywise concern, to give full allowance of all things to be done by you Our said Commissioners, or any two or more of you, according to Our pleasure hereinbefore declared. In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the            day of            in the            year of Our Reign.

By Warrant under the King's Sign Manual.

[To this the Great Seal is affixed.]

[Signature of the Clerk of the Crown.]

## § 2. SIGN MANUAL WARRANTS

(a) *Warrant as an executive act appointing First Commissioner of Works*

VICTORIA R.

Whereas We being graciously pleased to give and grant during Our pleasure unto Our right trusty and well-beloved A. B. the office of First Commissioner of Works and Public Buildings, constituted and appointed under and by virtue of an Act passed in the fourteenth and fifteenth years of Our Reign entitled 'An Act, . . .'<sup>1</sup>

We do by these Our presents hereby constitute and appoint him the said A. B. to be First Commissioner of Works and Public Buildings during Our Pleasure, with all the interest, powers, titles, authorities, privileges, and duties appertaining unto and vested in the said office.

Given at Our Court at Windsor this            day of  
in the            Year of Our Reign.

By Her Majesty's Command.

(Countersigned by two Lords Commissioners of the Treasury.)

<sup>1</sup> The Act is 14 & 15 Vict. c. 42, dealing with the management of Woods, Forests, and Land Revenues, and the direction of Public Works and Buildings, *ante*, pt. i, p. 211.

(b) *Warrant as an executive act, abolishing purchase in the army*  
VICTORIA R.

Whereas by the Act passed in the Session holden in the fifth and sixth years of the reign of King Edward VI, ch. 16, intituled 'Against buying and selling of offices,' and the Act passed in the forty-ninth year of the reign of George III, ch. 126, intituled 'An Act for the prevention of the brokerage and sale of offices,' all officers in Our Forces are prohibited from selling or bargaining for the sale of any Commission in Our Forces, and from taking or receiving any money for the exchange of any such Commission under the penalty of forfeiture of their Commissions and of being cashiered, and of divers other penalties; but the last-mentioned Act exempts from the penalties of the said Acts, purchases or sales, or exchanges of any Commissions in Our Forces for such prices as may be regulated and fixed by any regulation made or to be made by Us in that behalf.

And whereas We think it expedient to put an end to all such regulations, and to all sales and purchases, and all exchanges for money of Commissions in Our Forces, and all dealings relating to such purchases, sales, or exchanges.

Now Our Will and Pleasure is, that on and after the first day of November in this present year, all regulations made by Us or any of Our Royal predecessors or any officers acting under Our authority, regulating or fixing the prices at which any Commissions in Our Forces may be purchased, sold or exchanged, or in any way authorizing the purchase or sale or exchange for money of any such Commission, shall be cancelled and determined.

Given at Our Court at Osborne, this twentieth day of July, in the thirty-fifth year of Our Reign.

By Her Majesty's Command.

EDWARD CARDWELL.

(c) *Warrant conferring Precedence on the Prime Minister*

EDWARD R. & I.

Edward the Seventh by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, to our right trusty and right entirely beloved cousin and Councillor Henry Duke of Norfolk, Knight of Our most noble Order of the Garter, Knight Grand Cross of Our Royal Victorian Order, Earl Marshal, and our Hereditary Grand Marshal of England, Greeting.

Whereas We taking into Our Royal consideration that the precedence of Our Prime Minister has not been declared and



defined by due authority, We deem it therefore expedient that the same should be henceforth established and defined.

Know ye therefore that in the exercise of Our Royal Prerogative We do hereby declare Our Royal Will and Pleasure that in all times hereafter the Prime Minister of Us, Our Heirs and Successors shall have place and precedence next after the Archbishop of York.

Our Will and Pleasure further is that you Henry Duke of Norfolk to whom the cognizance of matters of this nature doth properly belong do see this Order observed and kept, and that you do cause the same to be recorded in Our College of Arms to the intent that Our Officers of Arms and all others upon occasions may take full notice and have knowledge thereof.

Given at our Court at Sandringham the second day of December nineteen hundred and five in the fifth year of Our Reign.

By His Majesty's Command,

A. AKERS DOUGLAS.

*(d) Warrant as an authority for affixing the Great Seal to the Ratification of a Treaty<sup>1</sup>*

GEORGE R.

Our Will and Pleasure is, that you forthwith cause the Great Seal of Our Realm to be affixed to an Instrument bearing date with these Presents (a copy whereof is hereunto annexed) containing Our Ratification of a \_\_\_\_\_ between Us and

concluded and signed at

on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, by the Plenipotentiaries of Us and of \_\_\_\_\_ duly and respectively authorized for that purpose. And for so doing this shall be your Warrant.

Given at Our Court of St. James's  
the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ in  
the \_\_\_\_\_ year of Our Reign.

By His Majesty's Command, *(Countersigned)*

To Our Right Trusty and  
Well-beloved Councillor

Our Chancellor of Great  
Britain

<sup>1</sup> This is an exceptional document: usually a sign manual warrant for affixing the Great Seal sets out (1) the authority, (2) the document to be sealed, (3) the purport of the document in a brief form called the docket (pt. i, p. 63). The authority to seal powers connected with treaties does not pass through the Crown Office, as do most matters requiring the Great Seal.

(e) *Warrant for affixing the Great Seal to the appointment of a Lord Lieutenant*

EDWARD R. & I.

Edward the Seventh by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, To Our right trusty and well beloved Councillor Our Chancellor of that part of Our said United Kingdom called Great Britain Greeting: We will and command that under the great seal of Our said United Kingdom remaining in your custody you cause these our Letters to be made forth Patent in form following:

Edward the Seventh to  
Greeting:

Whereas by the Militia Act, 1882, it was (amongst other things) enacted that it should be lawful for Us with regard to Great Britain and for the Lord Lieutenant<sup>1</sup> with regard to Ireland from time to time to appoint Lieutenants for the several counties in the United Kingdom NOW KNOW YE that We by virtue of the said Act of Parliament have nominated and appointed and by these presents do nominate and appoint you the said

to be Our Lieutenant of and in and of all cities boroughs liberties places incorporated and privileged and all other places whatsoever within Our said

and the limits and precincts of the same during Our pleasure in the room of

And We do by these presents give and grant unto you full power and authority to do execute transact and perform all and singular the matters and things which to a Lieutenant to be nominated and appointed by Us for the said

do by force of any law in anywise belong to be done executed transacted or performed And therefore We do hereby command you that according to the tenor of these Our Letters Patent you proceed and execute all those things with effect. In witness &c. Witness &c.

Given at Our Court at the  
day of One thousand nine hundred and  
in the year of Our  
reign.

By His Majesty's Command  
H. J. GLADSTONE.

<sup>1</sup> Now the Governor for Northern Ireland. In the Free State no such office now exists.

May it please Your Most Excellent Majesty This contains a warrant to the Lord High Chancellor to pass Letters Patent under the Great Seal whereby Your Majesty is pleased to nominate and appoint

Your Lieutenant of and in  
during Your Majesty's pleasure in room of  
And this warrant is prepared according to Your Majesty's royal command signified by Mr. Secretary Gladstone.

MUIR MACKENZIE

Clerk of the Crown in Chancery.

### § 3. COMMISSIONS AND ORDERS

*(a) Commission under Sign Manual for instituting an Inquiry*

GEORGE R. & I.

George the Fifth by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith to

A. B., C. D., E. F.

Whereas we have deemed it expedient that a Commission should forthwith issue to inquire into

*Here the Subjects are Set Out*

Now know ye that We reposing great trust and confidence in your knowledge and ability, have authorized and appointed, and do by these presents authorize and appoint the said A. B., C. D., &c. to be our Commissioners for the purpose of the said inquiry.

*Then follow the Powers Conferred, e.g. to Call Witnesses, and Inspect Places, &c.*

And Our further Will and Pleasure is that you do with as little delay as possible report unto Us under your hands and seals of any five or more of you your opinion upon the matters herein submitted for your consideration.

Given at Our Court at

19 , in the

the

day of

year of Our

Reign.

By His Majesty's Command.

*(b) Form of Commission on First Appointment to Permanent Rank in the Army*

GEORGE R. & I.

George by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India, &c.

To Our Trusty and Well beloved

We reposing especial trust and confidence in your loyalty, courage and good conduct, do by these presents constitute and appoint you to be an Officer in Our Forces

from the  
day of 19 . You are therefore  
carefully and diligently to discharge your duty as such in the rank  
of or in such higher rank as We may from  
time to time hereafter be pleased to promote or appoint you to,  
of which a notification will be made in the London Gazette, and  
you are at all times to exercise and well discipline in arms both  
the inferior Officers and Men serving under you, and use your best  
endeavours to keep them in good order and discipline. And We  
do hereby command them to obey you as their superior Officer,  
and you to observe and follow such orders and directions as from  
time to time you shall receive from Us or any your superior Officer,  
according to the rules and discipline of war, in pursuance of the  
trust hereby reposed in you.

Given at Our Court at Saint James's the day of  
19 , in the Year of  
Our Reign.

By His Majesty's Command.

*(c) Order by Warrant for a Free Pardon*

EDWARD R. & I.

Whereas A. B. was, at the Assizes holden at Chester in and for the County of Chester, on 1st January, 1907, convicted of Arson and sentenced to ten years' penal servitude.

We in consideration of some circumstances humbly represented unto Us, are Graciously pleased to extend Our Grace and Mercy unto him and to Grant him Our Free Pardon for the offence of which he stands so convicted. Our Will and Pleasure therefore is, that you cause the said A. B. to be forthwith discharged out of custody.

And for so doing this shall be your Warrant. Given at Our Court at St. James's the twenty-ninth day of February 1907, in the seventh Year of Our Reign.

To Our Trusty and Well  
beloved The Governor of Our  
Prison at Dartmoor  
and all others whom it may  
concern.

By His Majesty's Command.

*(Signed)*

H. J. GLADSTONE.

## § 4. OATHS

For the *Coronation Oath* see i, 270, 271.

For the *Privy Councillor's Oath*, see i, 153.

*The Oath of Allegiance*

I do swear that I will be faithful and bear true allegiance to His Majesty King George, His Heirs and Successors according to Law.

So help me God.

*The Official Oath*

I do swear I will well and truly serve His Majesty King George in the Office of

So help me God.

The persons who are required to take this oath are specified in 31 & 32 Vict. c. 72, and the list has been extended by a number of later Acts.

For England the oath is tendered by the Clerk of the Council and taken in the King's presence in Council or otherwise as he may direct.

For Scotland the oath is tendered by the Lord President of the Court of Session at a sitting of the Court.

*The Judicial Oath*

I do swear that I will well and truly serve our Sovereign Lord King George in the Office of and I will do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill will.

This oath is required of the Lord Chancellor and all the judges of the Supreme Court of Judicature, in England and Northern Ireland, of the Recorder of London; of the Lord Justice General and President of the Court of Session, the Lord Justice Clerk, the Judges of the Court of Session, and the Sheriffs in Scotland, and of Justices of the Peace for Counties and Boroughs in the United Kingdom.

In all places and for all purposes in which an oath is required by law an affirmation may now be made under the provisions of 51 & 52 Vict. c. 46.

## § 5. COLONIAL OFFICE

- (a) *COMMISSION passed under the Royal Sign Manual and Signet, appointing The Right Honourable the Earl of Selborne, P.C., to be High Commissioner for South Africa.*<sup>1</sup>

*Dated 15th March, 1905.*

EDWARD R. & I.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our Right Trusty and Right Well-beloved Cousin and Councillor William Waldegrave, Earl of Selborne, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said William Waldegrave, Earl of Selborne, to be, during Our pleasure, Our High Commissioner for South Africa, and as such High Commissioner to act in Our name and on Our behalf, and in all respects to represent Our Crown and authority in matters occurring in South Africa beyond the limits of Our Colonies of the Cape of Good Hope and Natal, and beyond the limits of any other place or territory in South Africa, in and over which We may from time to time have appointed a Governor.

II. And We do hereby authorize, empower, and command you to exercise in Our name and on Our behalf all jurisdiction, power, and authority in regard to Basutoland, the Bechuanaland Protectorate, Southern Rhodesia, and Barotziland, North-Western Rhodesia,<sup>2</sup> or elsewhere, which are now or shall hereafter be vested in Our said High Commissioner.

III. And We do hereby authorize, empower, and command you, as such Our High Commissioner, to transact in Our name and on Our behalf all business which may lawfully be transacted by you with the Representative of any Foreign Power in South Africa, subject nevertheless to such instructions as you may from time to time receive from Us or through one of Our Principal Secretaries of State. And we do require you, by all proper means, to invite

<sup>1</sup> The office is now not attached to the Governor-General's office as from 1910-30, but is held independently by an officer who is High Commissioner for His Majesty's Government in the United Kingdom in the Union. In his absence the Naval Officer Commanding acts. The title in 1934 was altered to High Commissioner for Basutoland, the Bechuanaland Protectorate, and Swaziland, and the functions of the office are now reduced to control of these areas and the exercise of certain powers in respect of native affairs in Southern Rhodesia. The Commission now issues from the Dominions Office.

<sup>2</sup> Barotziland and North-Western Rhodesia are now a distinct protectorate, Northern Rhodesia, not under the control of the High Commissioner.

and obtain the co-operation of the Government of any Foreign Power in South Africa towards the preservation of peace and safety in South Africa, and the general welfare and advancement of its territories and peoples.

IV. And We do hereby authorize, empower, and command you as such Our High Commissioner, in Our name and on Our behalf, to take all such measures, and to do all such things in relation to the Native Tribes in South Africa with which it is expedient that We should have relations, and which are not included within the territory of any Foreign Power, or within any territory for the administration of which We may from time to time have otherwise provided, as are lawful and appear to you to be advisable for maintaining Our Possessions in peace and safety, and for promoting the peace, order, and good government of the Tribes aforesaid, and for preserving friendly relations with them.<sup>1</sup>

V. [Appointment of Officers.]

VI. [Promotion of discussions between Colonies and Protectorates.]

VII. [Supersession of Lord Milner's Commission.]

VIII. [Officers to aid High Commissioner.]

Given at Our Court at Saint James's, this Fifteenth day of March 1905, in the Fifth year of our Reign.

By His Majesty's Command.

ALFRED LYTTTELTON.

*(b) Letters Patent constituting the office of Governor and Commander-in-Chief of the Transvaal<sup>2</sup>*

EDWARD THE SEVENTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting.

WHEREAS by our Letters Patent under the Great Seal of our United Kingdom of Great Britain and Ireland bearing date at Westminster the Twenty-third day of September, 1902, We did constitute the office of Governor and Commander-in-Chief of our Colony of the Transvaal and did provide for the Government of

<sup>1</sup> The delimitation of Africa has rendered this clause obsolete.

<sup>2</sup> These letters patent were additional to letters patent establishing a new constitution on the basis of responsible government. There is no reference to responsible government save the allusion to ministers in VI.

our said Colony: And whereas we are minded to make further provision for the Government of our said Colony:

Now know ye that We do declare our Will and Pleasure to be as follows:

I. There shall be a Governor and Commander-in-Chief in and over Our Colony of the Transvaal, and appointments to the said Office shall be made by Commission under our Sign Manual and Signet.

II. [Limits of Colony.]

III. We do hereby authorize and empower and command our said Governor and Commander-in-Chief (hereinafter called the Governor), to do and execute all things that belong to the said office of Governor according to the tenor of these and any other Our Letters Patent, having effect within the Colony, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the Colony.

IV. Every person appointed to fill the Office of Governor shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be read and published in the presence of the Chief Justice of the Colony, or of some other Judge of the Supreme Court, and such of the members of the Executive Council of the Colony who can conveniently attend, which being done he shall then and there take before them the Oath of Allegiance in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second year of the Reign of Her late Majesty Queen Victoria, intituled 'an Act to amend the law relating to Promissory Oaths': and likewise the usual Oath for the due execution of his Office and for the due and impartial administration of justice, which oaths the said Chief Justice or Judge is hereby required to administer.

V. The Governor shall keep and use the Public Seal of the Colony for sealing all things whatsoever that shall pass the said Seal.

VI. There shall be an Executive Council in and for the Colony, and the said Council shall consist of such persons being Ministers or other persons as the Governor shall from time to time in Our name and on Our behalf but subject to any law of the Colony, appoint under the Public Seal of the Colony to be members thereof.



Subject to any such law the members of the Executive Council shall hold office during our pleasure. Provided that the members of the Executive Council, existing at the commencement of these Our Letters Patent, may, if the Governor thinks fit, continue to hold office until the appointment of Ministers.

VII. The Governor may, in Our name and on Our behalf, make and execute, under the Public Seal, grants and dispositions of any lands within the Colony which may be lawfully granted or disposed of by Us.

VIII. The Governor may constitute and appoint in Our name and on Our behalf all such officers in the Colony as may be lawfully constituted or appointed by Us.

IX. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person holding any office or place within the Colony under or by virtue of any Commission or Warrant or other Instrument granted, or which may be granted, by Us or in Our name or under Our authority or by any other mode of appointment.

X. When any crime or offence has been committed within the Colony, or for which the offender may be tried therein,<sup>1</sup> the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one: and further, may grant to any offender convicted of any such crime or offence in any Court or before any Judge or Magistrate, within the Colony, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as he may think fit, and may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always, that if the offender be a natural born British Subject, or a British subject by naturalization in any part of Our Dominions, the Governor shall in no case, except where the offence has been of a political nature, unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from our said Colony.

[XI, XII, XIII make provision (a) for the succession to the Government in the event of death, incapacity, removal, or absence from South Africa of the Governor; (b) for the continuance of the

<sup>1</sup> This covers cases of crimes committed within the jurisdiction of the Admiralty, and triable in the colony.

exercise of his powers by the Governor if absent from the Colony, in some other part of South Africa on business of state, for not more than one month; (c) for the appointment of a Deputy by the Governor during a brief temporary absence either from the seat of Government or from the Colony.]

XIV. And we do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Colony, to be obedient, aiding and assisting unto the Governor, or to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Colony.

XV. In the construction of these our Letters Patent the term 'the Governor', unless inconsistent with the context, shall include every person for the time being administering the Government of the said Colony.

[XVI reserves power to revoke, alter, or amend the Letters Patent.]

XVII. And we do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within the Colony as the Governor shall think fit, and shall commence and come into operation on a day to be fixed by the Governor by Proclamation in the Transvaal Government Gazette.<sup>1</sup>

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster this Sixth day of December, in the Sixth year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

(c) *INSTRUCTIONS passed under the Royal Sign Manual and Signet, to the Governor and Commander-in-Chief of a Crown Colony.*<sup>2</sup>

*Dated 13th January, 1886.*

VICTORIA R.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Colony, and to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Colony.

Given at Our Court at Osborne House, Isle of Wight, this day of January 18 in the

year of Our Reign.

<sup>1</sup> By Proclamation in the Transvaal Government Gazette these Letters Patent were brought into operation on 12 Jan. 1907.

<sup>2</sup> This type remains in essentials unchanged in the most recent instructions.



from time to time lawfully discharging the functions of Colonial Secretary, Queen's Advocate, and Treasurer of the Colony, and such other persons holding offices in the Colony as We may from time to time appoint by any Instructions or Warrants, under Our Sign Manual and Signet, and all such persons shall be styled Official Members of the Legislative Council; and further of such persons, not holding offices in the Colony, as We may from time to time appoint by any Instructions or Warrants under Our Sign Manual and Signet, and all such persons shall be styled Unofficial Members of the Legislative Council.

[XIV-XXII. Procedure of Legislative Council.]

XXIII. The Governor shall not, except in the cases hereunder mentioned, assent<sup>1</sup> in Our name to any Ordinance of any of the following classes:

1. Any Ordinance for the divorce of persons joined together in holy matrimony.

2. Any Ordinance whereby any grant of land or money, or other donation or gratuity, may be made to himself.

3. Any Ordinance whereby any increase or diminution may be made in the number, salary, or allowances of the public officers.

4. Any Ordinance affecting the Currency of the Colony or relating to the issue of Bank notes.

5. Any Ordinance establishing any Banking Association, or amending or altering the constitution, powers, or privileges of any Banking Association.

6. Any Ordinance imposing differential duties.

7. Any Ordinance the provisions of which shall appear inconsistent with obligations imposed upon Us by treaty.

8. Any Ordinance interfering with the discipline or control of Our forces by land or sea.

9. Any Ordinance of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of Our United Kingdom and its dependencies, may be prejudiced.

10. Any Ordinance whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable.

11. Any Ordinance containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

<sup>1</sup> As is more explicitly stated in recent instructions he must reserve any such measures unless (as rarely happens) he refuses assent outright, or unless he has obtained in advance authority to assent.

Unless such Ordinance shall contain a clause suspending the operation of such Ordinance until the signification of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Ordinance be brought into immediate operation, in which case he is authorized to assent in Our name to such Ordinance, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed on Us by treaty. But he is to transmit to Us, by the earliest opportunity, the Ordinance so assented to, together with his reasons for assenting thereto.

[The remainder of the instructions relate to details as to the Government of the Colony.] V.R.<sup>1</sup>

### § 6. DOMINION STATUS

#### (a) *The Statute of Westminster, 1931*

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930 (22 Geo. V, c. 4) [11 Dec. 1931].

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as

<sup>1</sup> Instructions are signed at the head and initialed at the foot by the King, and are sealed with the Signet: but are not countersigned by the Secretary of State. This makes them an exceptional document.

part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894,

shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the significance of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9.—(1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion,<sup>1</sup> and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

*(b) Full Powers to W. T. Cosgrave to sign the Treaty for the Renunciation of War, 20 August, 1928*

GEORGE, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, &c.

To all and singular to whom these Presents shall come, Greeting!

WHEREAS, for the better treating of and arranging of certain matters which are now in discussion, or which may come into discussion, between Us and other Powers and States, relative to the renunciation of war as an instrument of national policy, We have judged it expedient to invest a fit person with Full Power to conduct the said discussion on Our part, in respect of Our Irish Free State: Know ye, therefore, that We, reposing especial trust and confidence in the wisdom, loyalty, diligence, and circumspection of Our Trusty and Well-beloved William Thomas Cosgrave, Esquire, Doctor of Laws, member of the Parliament of Our Irish Free State, President of the Executive Council of Our

<sup>1</sup> Up to 1935 none of the Dominions had adopted the Statute.



Irish Free State, have named, made, constituted, and appointed, as We do by these presents name, make, constitute, and appoint him Our undoubted Commissioner, Procurator, and Plenipotentiary, in respect of Our Irish Free State; Giving to him all manner of Power and Authority to treat, adjust, and conclude with such Ministers, Commissioners, or Plenipotentiaries as may be vested with similar Power and Authority on the part of the aforesaid Powers and States any Treaty, Convention, or Agreement that may tend to the attainment of the above mentioned end, and to sign for Us, and in Our name, in respect of Our Irish Free State everything so agreed upon and concluded, and to do and transact all such other matters as may appertain thereto, in as ample manner and form, and with equal force and efficacy, as We Our-selves could do, if personally present: Engaging and promising, upon Our Royal Word, that whatever things shall be so transacted, and concluded by Our said Commissioner, Procurator, and Plenipotentiary in respect of Our Irish Free State, shall, subject if necessary to Our ratification, be agreed to, acknowledged, and accepted by Us in the fullest manner, and that We will never suffer, either in the whole or in part, any person whatsoever to infringe the same, or act contrary thereto, as far as it lies in Our power.

In witness whereof We have caused Our Great Seal<sup>1</sup> to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of St. James, the twentieth day of August, in the Year of Our Lord, One Thousand Nine Hundred and Twenty-eight and in the Nineteenth Year of Our reign.

L. S.

(Great Seal of the Realm.)

*(c) Letter of Credence for the Envoy Extraordinary and Minister Plenipotentiary of the Irish Free State to the President of the United States, 22 February, 1929.*

GEORGE, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, &c.

To the President of the United States of America, sendeth Greeting. Our Good Friend.

BEING desirous of maintaining without interruption the repre-

<sup>1</sup> The Free State now has a Great Seal of its own which is used in place of the Seal of the Realm. So also the Union of South Africa, under the Royal Executive Functions and Seals Act, 1934.

sentation in the United States of America of the interests of Our Irish Free State, We have made choice of Our Trusty and Well-beloved Michael MacWhite, Esquire, to reside with You in the character of Our Envoy Extraordinary and Minister Plenipotentiary for Our Irish Free State.

We request that You will give entire credence to all that Mr. MacWhite may represent to You in Our name, especially when he shall assure You of Our esteem and regard, and of Our hearty wishes for the welfare and prosperity of the United States of America.

And so We commend You to the protection of the Almighty.

Given at Our Court of St. James, the twenty-second day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty-nine, and in the Nineteenth Year of our Reign.

Your Good Friend,

Signed on behalf of His Majesty the King

MARY R.  
EDWARD P.  
ALBERT.

## § 7. TREASURY

### (a) ROYAL ORDER

#### *Supply Services*

GEORGE R.

WHEREAS the several sums mentioned in the Schedule hereunto annexed have been granted to Us, by

to defray the expenses of the Public Supply Services therein specified, which will come in course of payment in the year ending 31st March 19      Our Will and Pleasure is, that you do, from time to time, authorize the Governor and Company of the Bank of England; or the Governor and Company of the Bank of Ireland, to issue or transfer from the account of Our Exchequer at the said Banks to the accounts of the persons charged with the payment of the said Services such sums as may be required, from time to time, for the payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule.

Provided that such issues or transfers shall be made out of the Credits granted or to be granted to you from time to time, on the account of Our Exchequer at the said Banks, by the Comptroller and Auditor-General, under the authority of the Exchequer and Audit Departments Act 1866 (29 & 30 Vict. c. 39, s. 15), and shall not exceed in the whole the amount of the Credits so granted out

of the Ways and Means appropriated by Parliament to the Service of the said year.

Given at Our Court at

this 19

By His Majesty's Command.

*To be countersigned by two Lords  
of the Treasury.*

*To the Commissioners of Our Treasury.*

#### SCHEDULE

<i>Supply Services for which voted or granted.</i>	<i>Amount.</i>	<i>Resolutions reported.</i>
	£ s. d.	

#### (b) REQUISITION FOR CREDIT FOR SUPPLY SERVICES

*Supply Services*

Year 19 .

Treasury, Whitehall,

19

By Virtue of the Exchequer and Audit Departments Act 1866 (29 & 30 Vict. c. 39, s. 15): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the Ways and Means granted for the service of the year ending 31st March, 19 , Credits on the account of His Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing balances thereof for the following sums, viz.:—

At the Bank of England . . . £

At the Bank of Ireland . . . £

*To be signed by two Lords  
of the Treasury.*

*To the Comptroller and Auditor-General.*

#### (c) GRANT OF CREDIT BY THE COMPTROLLER AND AUDITOR-GENERAL FOR SUPPLY SERVICES

*Credit for Supply Services*

Year 19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of a Requisition from the Lords Commissioners of His Majesty's Treasury, authorizing the same: I hereby grant a Credit to the Lords Commissioners of His Majesty's Treasury for the time being, on Account of His Majesty's

Exchequer at the Bank of \_\_\_\_\_, or on the growing  
Balance thereof, to the Amount of \_\_\_\_\_ on account  
of the Ways and Means granted for the Service of the year ending  
31st March, 19 .

Exchequer & Audit Department }  
19 . . } *Comptroller & Auditor-General.*  
*To the Governor & Company of* }  
*the Bank of* . }

(d) TREASURY ORDERS FOR ISSUES FROM THE EXCHEQUER  
ACCOUNT FOR SUPPLY SERVICES

*Supply Services*

Year 19 .

Treasury, Whitehall,

19 .

GENTLEMEN,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor-General, on the Account of His Majesty's Exchequer at the Bank of \_\_\_\_\_, under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sums, on the \_\_\_\_\_ instant, from the said Account to the 'Supply Account' of [His Majesty's Paymaster-General<sup>1</sup>] in your books, on account of the Supply Services undermentioned:—

<i>Supply Services</i>	<i>Amount.</i>		
	£	s.	d.

I am to request that when these sums shall have been transferred accordingly, you will transmit this authority to the Comptroller and Auditor-General.

I am, &c.

*To be signed by one of the Secretaries }  
of the Treasury.*

*To the Governor and Company of the }  
Bank of* . }

<sup>1</sup> [Or of such other Principal Accountants as the case may require.]

## (e) REQUISITION FOR CREDIT FOR CONSOLIDATED FUND SERVICES

*Consolidated Fund Services**Growing Produce*

Treasury, Whitehall,

19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being a Credit on the Account of His Majesty's Exchequer at the Bank of England for the sum of £ to provide for issues required for the following Services payable out of the growing produce of the Consolidated Fund in the current Quarter ending 19 .

<i>Service.</i>	<i>Account.</i>	<i>Amount.</i>		

*To be signed by two Lords  
of the Treasury.* }

*To the Comptroller and Auditor-General.*

(f) TREASURY REQUISITION AUTHORIZING CREDITS FOR  
CONSOLIDATED FUND SERVICES*Consolidated Fund Services*

Quarter to , 19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13): We authorize and require you to grant to the Lords Commissioners of His Majesty's Treasury for the time being, on account of the charge of the Consolidated Fund for the quarter ended , 19 , remaining unpaid at that date, Credits on the Accounts of His Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing Balances thereof, for the following sums, viz.:—

At the Bank of England . . . }  
At the Bank of Ireland . . . }

*To be signed by two Lords  
of the Treasury.* }

Treasury Chambers, Whitehall, }  
19 . }

*To the Comptroller and Auditor-General.*

(g) GRANT OF CREDIT BY THE COMPTROLLER AND AUDITOR-  
GENERAL FOR SERVICES PAYABLE OUT OF THE  
CONSOLIDATED FUND

*Credit for Consolidated Fund Services.*

Quarter to , 19 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13), and of a requisition from the Lords Commissioners of His Majesty's Treasury, authorizing the same: I hereby grant a Credit to the Lords Commissioners of His Majesty's Treasury for the time being, on Account of His Majesty's Exchequer at the Bank of , or on the growing Balance thereof, to the amount of £ on account of the charge of the Consolidated Fund in Great Britain (or Ireland, as the case may be), for the quarter ended , 19 , remaining unpaid at that date.

Exchequer & Audit Department)  
19 . } *Comptroller & Auditor-General.*

*To the Governor & Company of  
the Bank of .*

(h) TREASURY ORDER FOR ISSUE FROM THE EXCHEQUER ACCOUNT  
FOR CONSOLIDATED FUND SERVICES

*Consolidated Fund Services*

Quarter to 19 .

Treasury, Whitehall,  
19 .

GENTLEMEN,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 13), and of the Credit granted to the Lords Commissioners of His Majesty's Treasury, by the Comptroller and Auditor-General, on the Account of His Majesty's Exchequer at the Bank of England, under the provisions of the said Act: I am commanded by the Lords Commissioners of His Majesty's Treasury to request that you will transfer the following sums, on the inst., from the said account to the in your books, on account of the charge of the Consolidated Fund in Great Britain for the above-mentioned Quarter.

<i>Service.</i>	<i>Amount.</i>		
	£	s.	d.

I am to request that when these sums shall have been transferred accordingly, you will transmit this authority to the Comptroller and Auditor-General.

I am, Gentlemen,  
Your obedient Servant,

*To be signed by one of the Secretaries  
of the Treasury.*

*To the Governor and Company  
of the Bank of England.*

### § 8 WAR OFFICE

#### LETTERS PATENT CONSTITUTING THE FIRST ARMY COUNCIL

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our right trusty and well-beloved Councillor A. B., Our trusty and well-beloved C. D., E. F., G. H., I. K., M. N., P. Q., Greeting.

KNOW ye that We, trusting in your wisdom and fidelity, of Our special grace, do by these presents constitute and appoint you to Our Army Council for the administration of matters pertaining to Our military forces, and the defence of Our Dominions, with such power and authority for the purpose as has hitherto been exercised under Our prerogative by Our Secretary of State for War, Our Commander-in-Chief or other Our principal Officers who have, under Our Secretary of State for War, been charged with the administration of the Departments of the Army.

And We do command all Our Officers of Our military forces and all others in any department of Our Military Service, that they may be attendant on you and observe and execute all such orders as you may give in the exercise of your power and authority.

And know ye that We do grant unto you full power and authority from time to time to appoint such Officers for conducting the civil business of Our Military Service entrusted to you as shall seem necessary to you, and to revoke the appointment of any such officers as you shall see fit, and appoint others in their place, and

We enjoin all such officers and others whom it may concern to be obedient to you in all things as becometh.

And We grant unto you full power in relation to any power and authority for the time being vested in you under these Our Letters Patent to make such contracts and do all such other things as you may find necessary in your discretion for the better carrying on of Our Military Service, and generally to execute and to do every power and thing which formerly appertained to our Secretary of State for War, or to Our Commander-in-Chief or other principal Officers as aforesaid.

And know ye that your powers may be exercised and your duties performed by any three of your number, that Our trusty and well-beloved Councillor A. B. [the Secretary of State for War for the time being] shall be your President, and that any document may be signed on your behalf by any two of you and such person as you may appoint to be your Secretary.

In witness whereof We have caused these Letters to be made Patent.

Witness Ourself at Westminster this                      day of  
in the                      year of Our Reign.

By Warrant under the King's Sign Manual. [To this the Great Seal is affixed.]

MUIR MACKENZIE.



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